PRINCIPLES

OF

LEGISLATION

FROM

BENTHAM AND DUMONT.

BY

F. BOUTROS,

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—The usefulness of actions is the mark set on them by the Supreme Legislator by which reasonable beings discover it to be His will that such actions should be done.—*Sir J. Mackintosh. Progress of Ethical Philosophy, p.* 183.

FROM THE SERAMPORE PRESS.

1842.

PREFACE.

The three first parts of the following work may be considered generally as a free translation of Dumont's "Principles de Legislation Civile et Penale, ouvrage extrait des manuscrits de M. Jeremie Bentham, Jurisconsulte Anglais." The fourth part, or Principles of the Code of procedure, is almost entirely compiled from the two works of the same authors published under the titles of "Codification" and "Des Preuves." The three works alluded to are printed in six octavo volumes. I have ventured on a few alterations and additions, with the view of clearing up principles, anticipating objections, and also of supplying what appeared to me a deficiency in Bentham's theory of morals. Although he repeatedly admits the operation of what other moralists call "disinterested principles," such as affection, gratitude, benevolence, he has taken no notice of "conscientiousness," or the principle of action grounded on a notion of duty. As the existence of such a principle cannot be denied, and it is not inconsistent with the Utilitarian system as stated in this work, I have placed it among the motives which influence the conduct of men. Some illustrations and technicalities, of no great interest to the *general reader*, have been left out, for the purpose not only of reducing the bulk of the work, but also of adapting it to the capacity of every young man of ordinary intelligence, and making it fit to be put, as a school book, into the hands of the higher pupils of our Indian Schools and Colleges. A translation into Urdu is under preparation.

The invaluable assistance which Bentham has received from his friend and interpreter Dumont for the exposition of his system, the great influence which his legislative theories, thus dressed in a foreign garb, have obtained in Europe, are circumstances so well known that it is only necessary to allude to them here, in explanation of the present attempt to supply, from such a source, the want of an elementary work in the English language on the principles of Jurisprudence.

The great importance of the study of that science* can scarcely be overlooked in a scheme of general education, and has been repeatedly insisted upon in public documents relating to the nature of the instruction specially required by the people of India. The Court of Directors, in their Despatch of the 29th September 1830, stated that instruction in the principles of morals and Jurisprudence should be considered "as the scope and end of all endeavours with respect to the education of the Natives."†

The knowledge alluded to, appears to bear some similar relation to all investigations of civil and political affairs, which Mathematics do to the studies of the natural Philosopher. It furnishes a standard with which to test moral and political theories, and the opinions of ancient and modern historians on public measures, or any particular laws. Without it a man's judgments and opinions on those subjects are too often mere guesses, grounded on prejudices of education, instead of being the result of a rational and careful analysis in which each argument, each question, referred to a fundamental principle, is carefully weighed and examined. Errors may no doubt occur in the application of the theory of general Utility, but the principle itself will, after a more mature examination, lead to their discovery and correction.

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* The science of Jurisprudence may be divided into *General* and *Special*, the former treating of the general principles on which all good laws must be founded—the latter relative to the legal provisions of any particular Code, the circumstances in which each law was enacted, the mode in which those laws are construed and administered, &c. &c. The present work is limited to the illustration of the principles of *general* Jurisprudence, which constitute the standard by which the merits and demerits of any particular system of legislation may be tried and examined.

† Para. 5 of Mr. Colvin's note to Lord Auckland's Minute of the 24th November 1839.

INTRODUCTION.

1. The motives which influence the actions of men may be reduced to four distinct classes.

Men act generally, 1st. from a blind impulse, such as prejudice, habit, sympathy, or antipathy.

2ndly. From a notion of duty when education has impressed that notion on the mind so strongly, that it obtains a direct influence on the will more or less independent of regard to personal consequences.

3rdly. From religious motives, that is, from fear of punishment or hope of reward in the next world.

4thly. From views of self-interest, or in other words, from ambition, love of reputation, of ease or of fortune, &c.

A very slight degree of attention to the above will show what important influence the education of man must have on his future conduct. If his sympathies were early awakened in favour of virtue, if his benevolence was duly exercised and he was taught to pity and help the unfortunate, if he learned to act from a just notion of duty regardless of consequences, and if besides this his religious instruction, instead of diverting by unmeaning practices his attention from his moral duties, added to their imperative claims the sanction of commands received from the Almighty, it is clear that a common degree of selfishness and ordinary human passions are not likely to lead him away from the path of duty.

But if all the above motives should be wanting, or if their influence be insufficient, if in fact his moral education has been a failure, if no moral sympathy, no notions of duty, no religious spirit have been awakened in him, the last class of motives still remain, that founded on direct and material self-interest.

It is sometimes contended that self-interest is in reality the sole motive of our actions, that the man who murders his neighbour, and the person who exposes or even sacrifices his own life for that of another, are equally acting from self-interested motives. It is said that the former has for his object to satisfy a feeling of revenge or cupidity,

We may lay it down as a rule of universal application that no action is truly moral which is not on the whole, due regard being had to its proximate and remote consequences, beneficial to mankind. None can be criminal the consequences of which are not likely to produce more evil than good. It is very true, that in many instances we feel disposed to approve and admire actions without looking to their probable results, and the tendency of which is in fact rather questionable; but in such cases, as well as in those where an act useful to society is the result of motives not approved of, it will always appear that the act is praised or blamed, if not for its consequences, at least for the disposition, motives, or feelings which led to it, and which are considered praise-worthy or otherwise *on account of their tendency*.

Benevolence, Gratitude, Generosity, easily obtain our love and sympathy, but what constitutes the merit of the actions which proceed from such feelings is their utility, direct or indirect. Gratitude and Revenge are apparently natural instincts, and so is sympathy; the first and third together may lead us to approve of an act of benevolence rather blameable than praise-worthy: such for instance as favouring the escape of a criminal from the punishment due to his crime. Revenge and sympathy combined may induce us also to bestow our approbation on an action which is really injurious to the best interests of society. This might be the case when a man, taking the law into his own hands, revenges an insult by the death of his enemy. In all similar instances the cause of the error is that the remote consequences of the particular acts alluded to are not clearly and fully perceived. This itself tends to prove that what really constitutes the merit or demerit of good and bad actions, what should induce society to use all possible endeavours to encourage the one and check the other, is and can be nothing but the utility of the former and the contrary tendency of the latter.

The principles of morals are invariable as the laws of nature, but their application depends on the state of knowledge and civilization at any particular period. Some moral rules are obvious enough to be known in the infancy of society, while others are not understood without a careful analysis, and, perhaps at any time, are practised by the greatest number of men from mere prejudice. If ever our notions of duty are truly at variance with the principle of General Utility they

are wrong, because they should be regulated upon it. In a perfect moral education they would agree in every respect; the principle in question then having as it were, under the name of duty, identified itself with our moral faculty, which thus truly becomes a kind of moral sense or instinct.

The principle of General Utility has often been considered as opposed to what are generally called *disinterested feelings*, such as Benevolence, Enthusiasm, Conscientiousness, &c. This however is clearly an error. Far from being an enemy to those feelings the principle alluded to is their best friend. their surest and safest guide.*

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* Objections have also been made to the principle in question, implying that the expression "General Utility," or "Utility," as used by Bentham, is synonymous with "Expediency." A greater error than this could hardly be committed; the meaning of the former expression is often rather opposed to, than synonymous with, that of the latter. To judge of the *Utility* of any act it is necessary to take into consideration all the results, proximate or remote, likely to follow from it. *Expediency*, on the contrary, only looks to immediate consequences. The former principle can never be inconsistent with justice, the latter is often so. When Themistocles proposed to the Athenians to set fire to the assembled fleet of the Greeks, their allies, that Athens might thus become the mistress of the sea, his proposition was grounded on *Expediency*: the refusal of that celebrated people to be guilty of injustice for the sake of any immediate advantage, was exactly such as the principle of *Utility* would have dictated.

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ERRATA.

In the heading of the pages from p. 1 *to* 50 *strike off* "Book I." *Page* 57 *to p.* 89 *in the heading of the right hand page instead of* "Book II." *read* "Book I." *Page* 56 *to p.* 112 *instead of the heading of the left hand page read* "Principles of the Civil Code."

P.	iii	Line	7	*from above after*	"will" *put* ,
"	iv	„	21	„ *after*	"action" *put* ;
	v	„	9	„ *instead of*	"nonexist" *read* "non-exist"
	„	„	13	„ *after*	"acts" *put* ,
	„	„	18	„ *instead of*	"who" *read* "which"
	vi	„	17	„ *instead of*	"sympathy" *read* "Sympathy"
	8	„	8	„ *after*	"itself" *put* ,
"	8	„	11	„ *after*	"sin" *instead of* — *put* ;
	9	„	11	„ *after*	"reason" *instead of* ? *put* !
	10	„	6 & 20	„ *instead of*	"one'self" *read* "one's self"
"	12	„	6	„ *after*	"memory" *read* "association"
	13	„	10	„ *put a , after*	"evil" *and another , after* "sanctions"
"	14	„	6	„ *after*	"sanctions" *put ; and strike off* "all"
	17	„	3	„ *below, after*	"legislation" *put* ,
	18	„	7	„ *after*	"competitors" *put* ,
	23	„	22	„ *above, after*	"ascertained" *put* ,
"	24	„	7 & 9	„ *after*	"a man" *put ; and after* "laws" *put* ,

* The Author begs to apologize for the numerous errors, particularly of punctuation, in the first half of this volume, the proof sheets of which part of the Work he had no opportunity of correcting. The errors alluded to are not, fortunately, of much importance in general, and the few which confuse or alter the meaning are marked thus " in the above Errata that the reader may at once correct them.

P 25	Line	1	*from below, after*	"anxiety" *put* ,
„	„	8	„	*after* "selves" *put* ,
26	„	3	„	*below, after* "community" *and* 17*th D* „ "tion" *put* ;
27	„	13	„	*instead of* "criterium" *read* "criterion"
29	„	5	„	*after* "itself" *and* "actions" *put* ,
33	„	3	„	*after* "self defence" *put* ,
34	„	10	„	*after* "execution" *put* ,
„	„	11	„	*instead of* "necessary means" *read* "means necessary"
35	„	9 & 10	„	*above, the words* "negative" *and* "positive" *should be in italics.*
„	„	5	„	*below, after* "concealed" *put* ,
"36	„	19	„	*after* "marriage" *put* ;
40	„	13 & 16	„	*above, after* "law" *and after* "errors" *put* ,
"40	„	15	„	*after* "from" *put* "a kind of"
"41	„	20	„	*after* "him" *put* , "if he is guilty ,"
"50	„	1 & 5	„	*in the note. The words* "laws" *and* "law" *should be in italics.*
59	„	8	„	*above, after* "conciled" *put* ,
"59	„	2	„	*below, instead of* "constitues" *read* "constitutes"
"69	„	12	„	*instead of* "may be" *read* "may have been"
"69	„	26	„	*after* "himself" *read* "in some degree"
"71	„	18	„	*instead of* "and" *read* "for"
78	„	7	„	*after* "fall" *put* ,
80	„	8 & 9	„	*after* "prejudices" *and after* "foreigners" *put*
"90	„	2	„	*after* "reasons" *put* "have we not"
96	„	8	„	*above, after* "property" *put* ,
103	„	8 & 9	„	*after* "want" *and* "based" *put* ,
111	„	23	„	*instead of* "samaritan" *read* "Samaritan"
113	„	7	„	*after* "tyranny" *put* ,
"113	„	12	„	*instead of* "are" *read* "is"
117	„	9	„	*after* "fault" *strike off* ,
120	„	9	„	*after* "valuable" *put* ,
"120	„	14	„	*instead of* "concurrence" *read* "competition"
122	„	24	„	*after* "enjoyments" *put* ,
123	„	3	„	*below after* "men" *put* ,

P. 124	Line	6	*from below instead of*	"Government" *read* "government"
125	„	13	„	*above, after* "parents" *put* ,
„	„	5 & 6	„	*below, after* "easy" *and* "situated" *put* ,
126	„	8	„	*above, after* "property" *and 2d line from below after* "diction" *put* ,
127	„	13 & 14	„	*after* "father" *and* "children" *put* ,
„	„	3 & 4	„	*below, after* "parents" *put* , *and after* "children" *strike off* ,
128	„	8	„	*after* "productive" *put* ?
132	„	18	„	*above, after* "exist" *put* ,
134	„	11	„	*after* "contract" *put* ,
137	„	8	„	*below, instead of* "unequality" *read* "inequality"
141	„	9	„	*after* "polygamy" *put* ,
150	„	8	„	*above, after* "itself;" *10th line, after* "country;" *17th line after* "Sum;" *put* ,
154	„	25	„	*after* "Agent" *put* ,
155	„	3	„	*above, after* "him" *put* ,
"159	„	14	„	*after* "have" *read* "this"
160	„	3	„	*after* "order" *7th line after* "real;" *32nd line after* "them," *and 34th line after* "degree;" *put* ,
161	„	3	„	*after* "tendency" *and 9th line after* "sensibility" *put* ,
164	„	11	„	*after* "obtained" *put* ,
167	„	3	„	*after* "will" *put* ,
168	„	22	„	*after* "apprehended" *put* ,
170	„	5	„	*after* "question" *and 23rd line after* "nature" *put* .
173	„	20	„	*after* "and" *read* "the"
"178	„	9	„	*after* "sustain" *put* ,
181	„	11	„	*below, after* "remedy" *put* .
183	„	1	„	*above, after* "satisfaction" *put* ,
205	„	9	„	*below, after* "subjected" *instead of* , *put* :
208	„	5	„	*instead of* 4 *put* 5
209	„	6	„	*instead of* 5 *put* 6

P 210	Line	9	*from above after*	"death" *and after* "however" *put* ,
259	„	2	„	*instead of* "Procedrue" *read* "Procedure"
283	„	17	„	*instead of* "assertion" *read* "assertions"
289	„	12	„	*instead of* "nonage" *read* "non-age"
297	„	4	„	*instead of* ? *put* .
306	„	27	„	*before* "The various" *put* "3"
310	„	1	„	strike off "and"
315	„	5	„	*instead of* "had" *read* "has"

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I.

GENERAL PRINCIPLES

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CHAPTER I.

UTILITY.

PUBLIC happiness should be the object of the Legislator. General Utility is the ground on which every reasoning in legislation should be established.

The principle of General Utility when vaguely stated is seldom contradicted, but these words do not convey the same ideas to all men and the apparent assent is not real. To give the principle of General Utility every possible efficiency, and ground upon it reasonings intelligible to all, three conditions must be fulfilled.

1*st*. To attach clear and precise notions to it.

2*dly*. To establish its unity and supremacy. It is not enough merely to admit it, but it must be admitted without exception.

3*dly*. Some process of reasoning must be found by which uniform results may be obtained.

Nature has placed man under the empire of pleasure and pain. To these we refer all our judgments and determinations. The man who pretends not to be subject to their influence is in error, he has no other object but to procure himself a pleasure or avoid a pain even when he turns away from the greatest pleasure or submits to the greatest pain.

Utility is the tendency or property of a thing to preserve from some evil or procure some good. Evil is pain or cause of pain. Whatever tends to add to the welfare of an individual is said to be useful to

him, what tends to promote the welfare and happiness of a community is said to be useful to (i.e. to have utility for) that community.*

The logic of utility consists in grounding all reasonings on a comparison of pleasure and pain and nothing else.

For the man who adopts the principle of utility, virtue is good only in consequence of the pleasures or advantages derived from it, and vice bad, merely because of the evils it produces.† Of course the words pleasures and evils include both moral and physical pleasures and evils.

If a person who adopts the principle in question should find in the vulgar catalogue of virtues an act from which would result for mankind more pain than pleasure, he would unhesitatingly strike it off. If on the contrary he saw some indifferent action, some innocent pleasure, reckoned among vices, he would at once transfer that pretended crime to the class of legitimate acts; he would pity the pretended criminals and reserve his indignation for the pretended virtuous who persecute them.

Some verbal objections are made to the principle of utility, but it cannot be opposed except by reasons drawn from that principle itself. To object to it in any case is to say that in that case it is dangerous or objectionable, i. e. contrary to utility, to consult utility.

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* The principle of utility is by no means, as has been sometimes supposed, inimical to poetry and the fine arts. This error is probably in great measure the result of an unfortunate expression of Bentham, whose individual opinion on the subject of poetry is however no part of the utilitarian system. Whatever tends to raise the character of humanity, to make us happier and better, cannot possibly be without utility. So far as poetry and the fine arts contribute to the happiness and improvement of society, so far are they good and *useful*, and I suppose their warmest advocates do not claim for them the respect of mankind on grounds different from these.

† It is generally allowed, even by those who deny that an action is virtuous *because* of its general utility, that all virtuous actions are really *useful* in the sense here attached to that word. From the moment that this invariable connection between virtue and utility is admitted, it matters little in practice how it originates, since whether it exists as a relation of cause and effect, or be founded on an eternal principle laid down by the supreme Legislator, it is equally well adapted to be used as a criterion to distinguish *real* from *false* virtues.

The difficulty of this question depends on an error of language. It is usual to represent virtue as opposed to utility—virtue is, it is said, the sacrifice of our interest to our duty. But, to speak clearly, it should be said that there are interests of various kinds which in some circumstances are incompatible. Virtue is the sacrifice of a less to a greater, of a temporary to a permanent, of a doubtful to a certain, interest, possibly of quite a different kind. The performance of our duty is but the promotion of our interest in a particular point of view.

Some have made in this respect a distinction between politics and morals, they have limited the principle of utility to the former and that of justice to the latter; but this is the result of a confusion of ideas. All the difference between politics and morals, is that one refers to the conduct of Government and the other to that of individuals; they both have happiness for their object and the same considerations of general utility apply to them. A state has no more right to promote its interest at the expense of another nation, than an individual to enrich himself at the expense of his neighbour. What is morally bad cannot be politically good, unless several men have a right to do for themselves in the aggregate, what each of them, under analogous circumstances, would be wholly unjustifiable in doing for himself in particular.*

A man may do evil when he supposes he is acting according to the principle of utility, and so he may when acting from a feeling of duty.

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* Men to whom are entrusted the destinies of nations, are much more ready to violate the rules of morality in their conduct with foreign states than in their own private conduct. The principles of duty, religion, general utility, although equally applicable in both cases, have not here the same influence, because the personal interest of the agent does not, in the latter as in the former case, stand up alone in bold relief opposed to that of those who surround him. If his countrymen are to share in the advantages expected from the injustice he commits, they are ready enough to shut their eyes to its enormity, and to applaud in their agent or ruler an act they would reprobate in a foreign statesman. The impartial judgment of foreign states, not concerned in the question, is expressed at too great a distance to have much influence; or is attributed to the mean passions of jealousy and envy. The day of retribution appears so far off as to escape attention. and sometimes perhaps threatens the succeeding rather than the present generation.

A weak and narrow mind errs from taking into consideration only a small part of the good and evil consequences of its determinations. A person under the influence of a strong passion, likewise errs in attaching an undue importance to some advantage of which he does not perceive the evil consequences. But we must not impute to the principle itself errors contrary to it, and which alone it can help to correct. If a man makes a wrong calculation it is not the fault of arithmetic but his own.

Let us apply the doctrine of utility to an inquiry into the obligation which ties men to their engagements.

Men are not required to keep their engagements merely in consequence of the particular advantage of each engagement, but when the terms become onerous to one party, that party is bound to remain faithful to them on account of the general utility of engagements. Besides, independently of his religious feelings or pure regard to his duty, the person alluded to finds it in reality his interest, in almost every instance, to keep his word, merely that he may be considered as a man of integrity, and enjoy the advantages attached to honesty and esteem. It is not the engagement *in itself*, any more than the mere interest of the parties, it is General Utility which constitutes the obligation of any particular contract. There are illegitimate and pernicious engagements, which it would be criminal to fulfil.* If it were the contract in itself which created the obligation, it would always be equally binding; if a pernicious tendency renders contracts null and void in some cases, it must be a contrary, that is an *useful* tendency, which renders them valid in others.

See what sophistry one is reduced to who rejects the principle of utility. I am bound to keep my promise. Why? Because my conscience tells me so. Why are you bound to do what your conscience tells you? Because it is the will of God that I should. Why are

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* For instance, if a man should engage for a sum of money, or under any other circumstances, to assassinate, or illegally do injury to, any body, such an engagement would be void and illegitimate; the man guilty of making it, would add to his guilt by fulfilling his promise instead of breaking off the bargain as soon as he could.

you bound to do the will of God.* Because my conscience tells me it is my duty. And why are you bound to do what your conscience tells you? Such is the eternal circle from which it is impossible to escape. This is a source of unconquerable error and obstinacy. If any opinion can thus be grounded on a mere feeling or prejudice, there is no possibility to distinguish between an enlightened and blind conscience. All persecutors, all fanatics are justified.

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* If the answer should be "because God will punish me if I do not;" this would of course be at once acknowledging the principle of utility but only transferring it to the next world.

CHAPTER II.

PRINCIPLES OPPOSED TO THE PRINCIPLE OF UTILITY.

Ascetism. Sympathy and Antipathy.

The principles opposed to the principle of utility are two in number.

Ascetism. Sympathy and antipathy.

While it follows from what we have said above, that every pleasure is good in itself and is moral or immoral only so far as its enjoyment is calculated by its consequences to produce a preponderance of good or evil, the religious ascetic believes that every pleasure is in itself an evil, a sin—an idea of merit is associated in his mind with every privation. Any physical pain he inflicts on himself is, in his opinion, a new title to the regard of the Almighty.

The philosophical ascetic does not carry his folly so far. He hates pleasure but does not court pain. Pain he denies to be an evil, but he does not hold it up as a good.

Some of the most celebrated Greek and Roman Philosophers have carried this error to an extravagant degree. Pliny considered the use of perfumes as most culpable. In alluding to a man discovered in his retreat by his perfumes, he absurdly exclaims, "such an infamy absolves the whole proscription, did not such men deserve to perish?" The most reasonable cause from which the error alluded to may have originated is probably this. It was found that the love of pleasure was in many instances indulged to excess, that it led to objectionable acts, acts the good of which was not an equivalent for the evil which attended them. To put a check to the love of pleasure with reference to its evil consequences, is the object of sound morality and good laws, but to prohibit pleasure itself is to run from one excess in the other What is there in the world which is not liable to abuse?

The principle of sympathy or antipathy, by which we like or dislike, approve or blame without any assignable or sufficient reason, is

extremely arbitrary. Under its operation a man is favoured or persecuted for his personal appearance, the colour of his skin, his name, his religion, &c. Sympathy and antipathy may indeed often agree with the principle of utility; the more perfect the moral education of a man, the more his sympathy will be directed towards what is really calculated to produce the greatest possible happiness of society, and his antipathy will be excited by whatever is contrary to that end. But how frequently do we see men influenced by the prejudices of their education, by pride, envy, and other passions, approve or disapprove of actions from a blind impulse or feeling for which they can give no satisfactory reason? If an action be good or the reverse, why it is so may surely be explained. It is not enough to say it is unjust *because it is unjust*, it is good *because it is good*. With such a logic, men educated in different circumstances may dispute for ever without understanding each other. How many acts of injustice and tyranny, how many unjustifiable quarrels, how many civil and foreign wars have been the consequences of such absurd prejudices!

CHAPTER III.

PAINS AND PLEASURES.

SECTION I.—*Simple Pleasures.*

There are many different kinds of pleasures.

1*st*. Pleasures of the senses as taste, sight, &c. pleasure of feeling oneself in good health and in high spirits; pleasure of novelty when new objects are presented to our senses.

2*d*. Pleasures of wealth, i.e. of the possession of things which may be considered as instruments of enjoyment, pleasure, security, or power. The pleasure of wealth is most strongly felt at the time of acquisition.

3*d*. Pleasures of address or dexterity in overcoming difficulties or in making objects of utility or ornament.

4*th*. Pleasures of friendship.

5*th*. Pleasures of a good reputation.

6*th*. Pleasures of power, which consist in the consciousness of being able to act on the fears or hopes of others so as to direct their conduct.*

7*th*. Pleasures of piety which result from the conviction of having made oneself an object of favour to the Almighty.

8*th*. Pleasures of benevolence or sympathy which we enjoy in seeing the happiness of those we love and in contributing to it. In some persons these pleasures are limited to a narrow circle, in others they extend to the whole of mankind. Benevolence has also reference to some animals, the signs of their enjoyments and happiness are pleasing to us.

9*th*. Pleasures of malevolence, envy, hatred, of seeing our enemies suffer.

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* These pleasures include also that of a mere consciousness of physical or moral power without any reference to our fellow creatures.

10*th*. Pleasures of intelligence, study, discovery. For instance, the solution of a problem in Mathematics after a long study, &c.

11*th*. Pleasures of memory, or the recollection of former pleasures, or of dangers happily escaped, &c.

12*th*. Pleasures of imagination, of poetry, &c.

13*th*. Pleasures of hope, which result from the hope of a future pleasure which we believe we shall enjoy.

14*th*. Pleasures of association. We like to see an object indifferent in itself but which recalls some pleasure connected with it.

15*th*. Pleasures arising from the cessation of pain, or pleasures of relief.

16*th*. Pleasures of having performed one's duty, of feeling that whether we have obtained the approbation of others or not, we have at least deserved it.

SECTION II.

Simple Pains.

1*st*. Pains of privation, i. e. absence of a pleasure which we should like to enjoy. If we wish for a certain pleasure, but that the fear of *not* getting that pleasure be greater than our hope of obtaining it, the pain which results from this is, by anticipation, a pain of ungratified wish. If we had strongly hoped for the pleasure and cannot obtain it, it is a pain of disappointment. If we have had some good, which we expected to enjoy permanently, and are deprived of it, we experience the pain of regret.

2*d*. Pains of the senses, suffering from hunger, thirst, &c.

3*d*. Pains of awkwardness, which we experience sometimes in fruitless attempts at doing something which we find we cannot do.

4*th*. Pains of enmity, which a man feels when he knows he is an object of enmity to some individuals.

5*th*. Pains of a bad reputation.

6*th*. Pains of piety, which one feels from the fear of having offended the Almighty, and of incurring punishment in another world.

7th. Pains of benevolence or of sympathy, which are produced by the sight, or the idea, of the sufferings of our fellow men or of animals.

8th. Pains of malevolence or envy, which a man experiences at the idea of the happiness of those he hates.

9th and 10th. Pains of memory and imagination, are the reverse of the pleasures of the same name.

11th. Pains of fear, the reverse of the pleasures of hope.

12th. Pains of a bad conscience, resulting solely from feeling that we have acted wrong; that whether we escape or not the discovery of our moral degradation and the express contempt of our fellow men, we however deserve to be spurned and despised by them.

This catalogue of simple pleasures and pains, from a mixture of which pleasures and of which pains all pleasures or pains man can experience, originally spring, will be found useful in the sequel. The whole system of legislation rests on this sole basis, a knowledge of pleasures and pains. Rewards and penalties refer to nothing else. If we want to legislate with regard to a certain act, we must consider the pains which result from it to some individuals, the motive of the offender to commit the crime, the profit or pleasure obtained or expected from it, and lastly the legal punishment which it is proper to inflict, or in other words the pain which the criminal should be made to suffer, and which would be sufficient to deter him and others from committing a similar offence in future.

CHAPTER IV.

OF PAINS AND PLEASURES CONSIDERED AS SANCTIONS.

The legislator cannot influence individuals except by acting on the motives of their determinations, that is, by promises of reward or threats of punishment. A person to whom we could not give pleasure or pain would be entirely independent of us.

The pleasure or pain connected with the observance of a law are called the sanction of that law. The laws of a state are not obligatory in another because there they have no sanction.

Good and evil and accordingly sanctions may be divided into four classes.

1. Physical or Natural.
2. Moral and Popular.
3. Political or Legal.
4. Religious.

1. The pleasures and pains which one can experience or expect in the common course of nature, without the intervention of men, constitute the physical or natural sanction.

2. The pains and pleasures which we may expect from simply *deserving* the friendship or hatred, the esteem or contempt of other men, that is, from having acted up to our own notion of duty, constitute the *moral* sanction. The *popular* sanction (sometimes also called *moral*) consists in those pleasures and pains which we may expect to derive from *actually obtaining* that friendship or hatred, esteem or contempt.

3. The pleasures or pains which may be expected from the Magistrates as dispensers of the law, constitute the political or legal sanction.

4. The pleasures or pains which may be expected from the promises or threats of religion constitute the religious sanction.

A man's house is destroyed by fire. If by his own imprudence, the loss and consequent pain is due to the *natural* sanction If by a

sentence of the Judge, it is due to the *legal*, and if by the malevolence of his neighbours, to the *popular* sanction. It will be a pain inflicted by the religious sanction if it be considered as an immediate and special act of the Deity.

In this instance it is seen the same pains in kind belong to all the sanctions, all the difference is only in the circumstances which produce them.

These four sanctions do not act on all men in the same manner or in the same degree; sometimes they act in concert and at other times in opposition. When they agree, their influence is irresistible, but otherwise they weaken each other and produce uncertainty and contradiction in the conduct of men.

One may imagine four codes of law corresponding to those four sanctions. If those four codes agreed with each other in every respect they would be perfect. We are very far from that point of perfection, though perhaps it is not impossible to reach it. The legislator however must recollect that he can dispose immediately of none but the legal sanction. The three others will either agree or disagree with it. If he neglects to take this into consideration, he will find himself mistaken in his calculations, but if he gets those sanctions to support his views, his influence will be immense. The four sanctions cannot be united however except under the standard of utility.

The natural sanction is the only one which acts by itself and without interruption; it is the only one which in its chief points never changes; all the others gradually come nearer and nearer to it; by it their errors are checked, and all uniformity in the feelings and judgments of men is due to that sanction.

The moral or popular and religious sanctions are more liable to change and more depending on the prejudices of education and the caprice of men. The force of the popular sanction is more equal, more permanently the same, and it more constantly agrees with the principle of utility. The force of the religious sanction is more unequal, more changing and more subject to errors. It gets weaker if left alone, but grows again with opposition.

The political or legal sanction is in some respect superior to the others; it is clearer in its precepts, surer and more exemplary in its effects; besides, it is easier to improve it. Every advance it makes

towards perfection influences the progress of the other sanctions; but it embraces only certain actions of a particular kind, it has not a sufficient hold on the private conduct of individuals; it cannot be brought to bear except on proofs which it is often impossible to get, and it may be evaded by secrecy, force, or cunning. Thus, when we examine these various sanctions in what they do, and what they cannot do, we see the necessity of not rejecting any, but of making use of them all, and directing them towards the same end.

The systems which have chiefly created divisions among men, were the result of an exclusive preference given to one or the other of those sanctions. Each has had its partisans who have tried to raise it above the others. Each has had its enemies who have tried to degrade it in showing its weak side, pointing out its errors, and exposing all the evils which have sprung from it, without taking any notice of its good effects. Such is the true theory of these paradoxes which in turn oppose nature to society, politics to religion, religion to nature and Government.

Every one of these sanctions is liable to error, that is, to be applied contrary to the principle of utility. For instance, the disgrace which after the death of a criminal is reflected on his innocent family, is an error of the popular sanction. The offence of usury is an error of the legal, heresy and magic of the religious, and some sympathies and antipathies of the natural sanction. The germ of the disease is in one of those sanctions from which it spreads into the others. In every instance, it is important to find out the origin of the evil before selecting and applying the remedy.

CHAPTER V.

ESTIMATION OF PLEASURES AND PAINS.

To give pleasure and remove pain is the only end of the legislator: these constitute the whole machinery he can employ. It is therefore necessary that he should well study their value.

The value of a pleasure, considered in itself and with reference to one person, depends on four circumstances:

1. Its intensity.
2. Its duration.
3. Its certainty.
4. Its proximity.

The value of a pain is equally dependent on these four circumstances.*

But it is not sufficient to examine the value of pains or pleasures in themselves; both may have consequences which will themselves be painful or pleasurable. To calculate then the tendency of an act from which an immediate pain or pleasure is the result, it is necessary to take into consideration its *fecundity* and its *infecundity*, that is, the probability that it will or that it will not produce others.

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* The increased effect produced on the imagination by the proximity and certainty of a dreaded event, may be clearly seen from the comparative indifference with which a man thinks and speaks of his own death when in good health, and the horror with which he looks upon his dissolution when near at hand. It is a matter of general remark, how little influence the prospect of eternal and infinite rewards and punishments has on the conduct of men. Not only those rewards and punishments are remote, but the idea of the former cannot have much effect on the imagination to which they are inconceivable; and as to the latter, every one—even at the time of committing an offence believed to deserve eternal condemnation—flatters himself with the hope of escaping them by repenting in time, and obtaining through his repentance the pardon of his transgressions.

In estimating the value of a pleasure or a pain with reference to several persons, its extent, that is the number of persons who will be affected by it, must not be lost sight of.

To estimate the pleasures or pains resulting from a given act, all these considerations must be attended to. These are the elements of moral calculation, and thus legislation becomes an application of arithmetic. Evil inflicted being the debit and the good obtained the credit, the balance shows the profit or loss resulting from the operation of the legislator.

This is a slow but sure method, whereas what is called *feeling* is a mere guess very likely to mislead. It is not of course necessary in every instance to go through every step of the method exposed above; when a man has become familiar with it, and acquired the correctness of judgment which results from such considerations, he compares the sum of the good and evil consequences of an act with so much ease and quickness, that he is not conscious of every step in his reasoning. This analytical method however again becomes necessary when some new or complex operation occurs, or when it is necessary to clear up a contested point, to explain or demonstrate some truths to those who are not yet acquainted with them.

This theory of moral calculation has never been clearly exposed but has always been attended to in practice, at least in cases where men have had a clear idea of their interest. What is the value of a piece of land? Is it not the sum of pleasures which may result from it? Does not this value depend on the greater or shorter period during which the ownership may be secured, the certainty or uncertainty of not being disturbed in it, and the proximate or remote period at which it is first to be enjoyed?

The errors in the moral conduct of men and in legislation always relate to some of these circumstances which have been unperceived, forgotten, or ill appreciated in the calculation of pleasures and pains.

CHAPTER VI.

OF THE CIRCUMSTANCES WHICH INFLUENCE SENSIBILITY.

Every cause of pleasure or pain does not give to every one the same amount of pleasure or pain. This is what constitutes the difference of sensibility. This difference is in degree or in nature, that is, in the former case the impression of the same cause gives to some persons sensations similar in kind but unequal in degree, and in the latter case the sensations given are altogether of an opposite nature.

This difference of sensibility is matter of experience. Things do not affect us equally in sickness as in health, in poverty or in wealth, in infancy or old age.

The chief and original causes of this difference may be considered as arising from temperament or natural constitution, health, strength, bodily imperfections, intellect and imagination, energy, perseverance, natural disposition, notions of honour, of religion, sympathy, antipathy, insanity.

All these are well known to have important effects on sensibility; a pain which may kill a weak man would scarcely affect a strong one; an allusion which would pass unperceived by other men may wound the feelings of a half-blind man or a hunch-back; some men are easily driven to despair while others stand firm against all misfortunes; notions of religion may render the most timid and good tempered men brave or cruel; sympathy with those we love may increase our own sufferings, and the value of our successes may be greatly heightened in our eyes by the idea of the pleasure they will afford to those who love us. The honour of a father is reflected on his son, the shame of a son brings disgrace on his father. The annoyance which we sometimes experience from the success of our competitors is much greater when the successful individuals happen to be men for whom we entertained a strong dislike and antipathy.

Secondary causes produce a difference of sensibility which it is also important to attend to. These are, sex, age, rank, pecuniary circumstances, usual occupations, climate, race, government, form of religion. These I call *secondary*, because they are dependent upon the

causes first alluded to. The difference of sensibility which results from a difference of sex, is grounded on a different degree of strength, energy, notions of honour, feelings of sympathy, &c. So the effect of rank on sensibility is the result of cultivated intellect and imagination, notions of honour, increased sympathy, family connexions, &c. It is the same with all others, but the most important distinction of what are here denominated *secondary* causes, is that they are more apparent, and more easily appreciated than the original ones.

1. *Sex.*—The sensibility of women appears to be greater than that of men. Their health is more delicate. They are inferior in strength, in instruction, in intellect and in firmness. Their moral and religious sensibility is more easily affected, sympathies and antipathies have more influence over them. The honour of a woman consists more in chastity and modesty, that of a man in honesty and courage; her religion has more tendency to superstition, that is, to petty religious observances. Her affection for children is stronger: women sympathize more with the unfortunate whose sufferings they witness; the very care they take of the afflicted endears the latter to them, but their views of benevolence are more narrow than those of men, they are less governed by the principle of utility. They seldom embrace in their affections the welfare of their country in general, still less that of mankind, and the interest they take in a party depends almost invariably on some private sympathy. There is more caprice and imagination in their affections and antipathies, while man has more regard to personal interest and public utility. In fact, woman is better for the family and man for the state. Woman is more fitted for domestic economy and man for public administration.

2. *Age.*—Each period of life has a different effect on sensibility, which it is however difficult to determine. Infancy requires a continuous and attentive protection. The affections of youth are quick and lively, but not much governed by prudence. The legislator finds it necessary to protect this age against the errors and faults into which a want of experience and warm passions might betray it.

3. *Rank.*—This circumstance is so much dependent on the political constitution of states, that it is nearly impossible to say any thing positive on the subject. It may be generally observed, however, that sensibility is greater, and notions of honour have more influence, in the higher than in the lower ranks of society.

4. *Pecuniary circumstances* are the result of the total amount of means compared with the total amount of wants. *Means* are the income or profit from whatever source; *wants* depend on habits, the manner in which a person has been educated, the usual style in which he has been accustomed to live. Any thing beyond this is considered as in some degree superfluous, but any thing less is felt as a privation. *Wants* are also the result of other circumstances, as a numerous family to provide for, some necessary and unforeseen expenses to incur, expectations of profit, inheritance, &c. It is clear that hopes of fortune, if strong, may be considered as real *wants*, and their loss may affect a person almost as much as the loss of a property which was actually in his possession.

5. *Education.*—Physical education gives health and strength to the body; intellectual education affords instruction to the understanding, and to a certain degree produces firmness and perseverance. To moral education must be attributed inclinations, notions of honour and religion, sentiments of sympathy, &c. Under the general idea of education may be included usual occupations, amusements, connections, habits; but, in speaking of education, it must not be forgotten that it is modified by external circumstances, and natural dispositions, which render its results incalculable.

6. *Usual occupations* have an influence on all other causes, health, strength, instruction, inclinations, notions of honour, &c. We generally see some feature of a common character in certain professions, priests, military officers, lawyers, merchants, &c.

7. *Climate.*—It appears indisputable, that in hot climates men are not so strong; the soil being more fertile, they are not compelled to labour so much; they are more inclined to love, and indulge that passion at an earlier age. Their imagination is more lively, their understanding quicker, but less strong and energetic.

8. *Race.*—A Negro born in France or in England, is in many respects a different being from a child born of French or English parents. An English child, born in India, is at the moment of his birth different from an Indian child. The race may from the first influence the natural dispositions upon which every thing else is grounded; afterwards its effects are much more clearly seen on the religious and moral notions, the sympathies and antipathies.

9. *Government* has an influence similar to that of education. The

magistrate may be considered as a national teacher; and, under a careful and attentive government, a father himself is nothing as it were but the deputy of the magistrate; with this difference, that the authority of the former has its limits in time, and that of the latter lasts for ever.

The influence of this cause is immense: it may be said to include every thing but natural constitution, race and climate. Health itself may in some measure depend upon it, in consequence of the attention of the police to procure abundance and remove all causes of disease, as filthiness, swamps, &c. The mode of directing education, of disposing of public appointments, of bestowing rewards and inflicting punishments, determines in great degree the moral and physical qualities of a nation.

Under a well constituted, or merely well conducted, Government, men will generally be more under the influence of notions of honour, and those notions will relate to actions more conformable to public utility. Religious sensibility will be more free from fanaticism and intolerance, and not so apt to be degraded into superstition. There will be a common feeling of patriotism; popular affections will be directed towards the whole country. There will be perceived a general disposition calmly to discuss questions important to public happiness.

10. *The form of religion* has great influence on sympathies and antipathies, on notions of honour and virtue. The degree of instruction, strength or weakness of mind of an individual, and his inclinations, may often be known merely from knowing to what sect he belongs. It is true however that many profess in public a religion of the truth of which they are not well persuaded; but the strength of first habits and social connexions, and the power of example, continue to operate even after the principle from which they originated, no longer exists. Many, who in reality are no longer in their hearts Jews, Christians, Mahomedans or Hindoos, still continue to entertain a certain partiality for the followers of the religion in which they were born, and a comparative antipathy for the religionists of other denominations.

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CHAPTER VII.

PRACTICAL APPLICATION OF THIS THEORY.

THE penal Code, in all its parts, requires a scrupulous attention to the following various circumstances.

1. *To estimate the evil of an offence.*—The same offence in name, may not be the same in reality, when the sensibility of the person offended is different. The same action which would be a gross insult to a woman, may be a matter of indifference to a man. A bodily injury, which would perhaps endanger the life of a sick person, may be a trifle to a man in health. An imputation which might ruin the honour or the fortune of a man, would perhaps do no harm to another.

2. *To give a proper satisfaction to the person offended.*—The same *nominal*, is not the same *real*, satisfaction, where the sensibility essentially differs. A pecuniary satisfaction for an insult, might be proper or offensive, according to the rank of the person to whom it was offered, to his fortune and to the general opinion of society. It may be a sufficient satisfaction for a man who has been insulted by his superior or his equal, that the latter should publicly apologize to him, but this would not be enough from an inferior.

3. *To estimate the degree and impression of punishment on offenders.*—The same nominal amount of punishment, may be very different in reality where the sensibility also is different. Banishment is not an equal punishment to a young or to an old man, to a bachelor or to the father of a family; to a common labourer who has no means to live in a foreign country, or to a rich man for whom banishment is nothing but a change of scene. Imprisonment will not be an equal punishment for a man, or a woman, for a person in health or for one in sickness, for a rich individual whose family does not suffer from his absence, or for one who has nothing but his labour to support his.

4. *To transfer a law from one country to another.*—The same nominal law would have very different effects among different nations. A law which in Europe promotes the happiness of families might be very injurious in Asia. Women in Europe are accustomed to be free, and even to assume domestic authority in their own houses; in Asia

on the contrary they are prepared by their education for the confinement of the harem and even for slavery. Marriage in Europe and in the East is not a contract of the same kind; by attempting to subject it to the same rules, the happiness of all the parties to it would be put in jeopardy.

The principle of the same punishments for the same offences has an appearance of justice and impartiality which may seduce at first, but to give it a reasonable sense, it is necessary to determine what is understood by *same punishments and same offences*. An inflexible law which should pay no regard to sex, age, education, rank, fortune, would be either inefficient or tyrannical. Too severe for one or too indulgent for another, it would, under an appearance of equality, conceal the most odious inequality.

When a man of large fortune and one of moderate means are sentenced to pay the same fine, is their punishment equal? Do they suffer in the same degree? If not, the inequality of their punishment is rendered more shocking from its pretended equality. It is evident that the object of the law is not answered, since one may lose his means of livelihood while the other experiences no loss of any consequence to him.

It has been objected, that many of the causes which influence sensibility could not easily be ascertained and could not in practice be taken into consideration by the Judge or Legislator. It has been urged, that a father may attend to all those differences in his conduct with his children, but that in framing a code of laws for a great nation, a legislator must limit himself to general rules which would become too intricate if he entered into particulars, and that to leave it to the Judge to determine all those particular points, would be leaving every thing to his caprice.

This difficulty however is not so great as it may appear. It is true, that many of the circumstances which affect sensibility are not easily ascertainable, but others are such that no difficulty whatever can occur in attending to them. The circumstances which I have called secondary, that is, sex, age, rank, pecuniary circumstances, race, climate, government, education, form of religion, are evident and may be taken to represent internal dispositions. The legislator thus escapes the greatest difficulty. He does not attend to metaphysical or moral qualities, but to external circumstances, which are generally found to corres-

pond with them. He orders such and such modification of a punishment not according to the greater sensibility, or firmness of a person, but according to his or her age or sex. It is very true, that the presumptions drawn from these circumstances may be erroneous; a boy of fifteen may be more enlightened than a man of thirty; a woman may have more courage and less modesty than a man, but generally speaking it will not be so, and those presumptions will be found sufficiently correct to avoid making tyrannical laws and to secure to the legislator the sympathy of public opinion. There will be no caprice in the matter; as little as possible will be left to personal discretion; it is not the judge but the law which will modify such and such a punishment according to some general rules relating to the sex, age, religion, &c. of the offender. In fact, what is here recommended has been more or less attended to by all legislators. They had some vague and confused notion of the difference of sensibility, and hence punishments differ for women, children, freemen and slaves.

Draco appears to be the only legislator who considered all offences equal, because they were all violations of the law. He sentenced to death all offenders. His horrid Code however did not last long, and probably his laws were never literally and strictly applied.

When the legislator studies the human heart, accommodates himself to different degrees and various kinds of sensibility, his precautions, exceptions and limitations please as acts of paternal tenderness, this is the origin of the approbation which we give to laws under the name, rather vague, of humanity, equity, propriety, moderation or wisdom.

CHAPTER VIII.

ANALYSIS OF GOOD AND EVIL—HOW THEY SPREAD IN SOCIETY.

Legislation is only a choice of evils. Every law is in itself an evil, since it is a breach of natural liberty, but the duty of the legislator is to assure himself in every case; 1st. that the acts he endeavours to prevent are real evils; 2d. that they are evils greater than those by which he wants to prevent them. He has two things to consider; the evil of the offence and that of the law; the evil of the disease and that of the remedy.

An evil seldom comes alone, a misfortune cannot befal an individual without spreading as from a centre and being felt by others round him. An evil of one kind sometimes springs from evils of another kind, at other times good springs from evil and evil from good. All these changes are important to know and distinguish, but happily the modifications of evils are very distinct and not numerous. They are

Evil of the first degree, ...	primitive. derivative.
Evil of the second degree, ...	danger. alarm or apprehension.
Evil of the third degree.	

Besides, evils may be extensive, divisible, immediate, consequential, permanent, temporary.

The evil which results from a bad action and falls immediately on some particular individuals, is the evil of the first degree, which includes the actual or *primitive* evil suffered by those individuals themselves and the *derivative* evil which is experienced as a consequence of the former by the relatives and friends of the injured parties.

The evil of the second degree is a consequence of that of the first degree, and is felt by the community generally. It may be divided into danger and alarm. These two branches of the same evil are closely connected but however may exist separately. There may be danger where it is not apprehended, and fear when no danger exists. An imaginary conspiracy may cause a great deal of anxiety and a

real one burst out in the midst of a general feeling of security. However, danger and alarm generally go together, as natural effects of the same cause. The evil which has actually happened leads to the expectation of similar evils and renders them probable. A bad action produces a danger from example, and prepares the way to another act of the same kind in suggesting the idea of committing it, and increasing the temptation.

Attend to what passes in the mind of certain individuals when they hear of a successful theft. They were not aware of that mode of making money, at least they were not thinking of it, but immediately the example given is followed by the temptation to imitate it. The thing has been successfully done by another and consequently may be done again; it is only necessary to take proper precautions. So long as the first offender escapes punishment, the fear of the laws is diminished; the fear of disgrace also diminishes at the idea of accomplices with whom a kind of insurance association may be considered to exist against the evil of public contempt.

The evil of the third degree is the result of permanent apprehension carried to such a point as to produce discouragement and disgust. When vexations and depredations have become a matter of daily occurrence, the labourer only works so as to save himself from starvation, all his active faculties have disappeared, he no longer strives, because he no longer hopes, to save and accumulate; indolence becomes his greatest comfort; the most fertile lands remain uncultivated.

Let us apply this theory. You have been beaten, wounded, insulted, robbed. The total amount of your sufferings considered in yourself alone constitutes the primitive evil: you have friends who sympathize with your sufferings; you have a wife, children, relatives, &c. upon whom falls part of the insult you have received—you have creditors whom your loss compels to wait for the payment of your debts. All these persons suffer more or less from the misfortune which has happened to you, their sufferings are the result of yours or *derive* from yours. These two divisions constitute the evil of the first degree.

But this is not all. An account of the robbery spreads among the community, an idea of danger, an alarm is produced. This alarm is more or less felt according to what is related of the conduct of the robbers, of the treatment received from them, of their numbers, of

their means. It is again modified by the greater or less liability of those who hear it to a similar misfortune, their strength, energy, &c. The danger and the alarm are the evil of the second degree.

If the injury you have received be one the direct consequences of which extend to others besides yourself, if an imputation made on your honour includes another class of individuals, the wrong is no longer a private injury, it is an *extensive* evil. It is increased in proportion of the number of those whom it affects.

If the sum of money stolen from you belonged to a club or to the state, the loss is divided among several parties, it is a *divisible* evil: contrary to the preceding case the direct evil is here diminished in proportion to the number of those who are affected by it. The subdivision may be such that the loss of each individual will be reduced almost to nothing.

If in consequence of the wound you have received, the immediate evil you have suffered, you are exposed to another evil distinct from the first, as for instance, to lose a good appointment, to miss the opportunity of an advantageous speculation, this may be considered as a *consequential* evil.

A *permanent* evil is one which cannot be altered, as death, amputation. The evil is *temporary* if it be such as may cease altogether, as for instance a wound which may be cured and compensated.

These distinctions are by no means useless. It is only thus that the difference in the enormity of different crimes may be appreciated and the proportion of penalties regulated. They will furnish us a moral criterium to analyse human actions, as metals are decomposed to ascertain their intrinsic value and the precise quantity of alloy.

If among bad actions, or those which are considered such, there are any which produce no alarm, what a difference between them and those which do so! The object of *primitive* evil is only one individual, *derivative* evil can only extend comparatively to a few, but the evil of the second degree can extend to a whole community. If a fanatic, for instance, assassinates a man because the latter's religious opinions differ from his, the evil of the second may be a thousand times greater than that of the first degree.

There are a great many offences, the whole evil of which consists in danger. Suppose an offence against justice, the discharge on his trial of a prisoner really guilty. This is an evil undoubtedly, since there is

Have I to examine an attempt on the life of an individual? I compare all the pleasure experienced by the agent with the evil inflicted on the sufferer. I at once perceive that the evil of the first degree is greater than the good of the same degree. But I do not stop there, the action alluded to creates alarm and danger in the community. The evil which at first fell only on one person spreads over all in the shape of fear. The pleasure resulting from the act is only for one man, the evil is for a thousand, for a million. The disproportion, already immense, will appear still greater if I consider the evil of the third degree, and reflect that if such acts were not prevented, a general and lasting discouragement, a cessation of work and ultimately the dissolution of society would follow as a consequence.

I will review the strongest desires, those the satisfaction of which affords the greatest enjoyment, and it will be seen that their accomplishment, when it takes place at the expense of security, produces incomparably more evil than good.

1. Let us take first *Enmity*. This is the most common cause of attempts against honor and person. I have conceived, never mind why, some enmity against you; under the influence of passion I insult, humble, wound you. The sight of your humiliation and sufferings may for a moment excite in me a feeling of pleasure. But even at this moment is it possible to suppose that the pleasure I enjoy is equal to the pain you suffer? And does not this pleasure soon betray its natural impurity? Humanity, a principle which nothing perhaps can altogether eradicate from the most cruel heart, soon awakens a secret remorse in mine. Fears of all kinds, fear of revenge either from you or your friends, fear of public opinion, religious fears, if I have still any feelings of religion, all those soon disturb my security and corrupt the joys of my triumph. The passion is gone, the pleasure is over; self reproach succeeds to it. But, as far as you are concerned, the pain lasts still and perhaps may last long. This is merely a case where your wounds are supposed to be slight and such as may be cured with time; but what would it be if from the nature of the injury the wound was incurable, and the evil could not be repaired? If life had been taken, limbs broken, faculties destroyed? Weigh the evils, their intensity, their duration, their consequences, measure them in every way and see whether the evil is not altogether incomparably greater than the pleasure.

But let us now look to the evil of the second degree. The account of your misfortune creates alarm in the minds of all. Every man who has or may have an enemy, thinks with apprehension of all that the passion of hatred can inspire. Among weak and irritable beings, who have so many things to envy each other, so many subjects of petty rivalries, the spirit of revenge, if indulged in, must produce innumerable evils.

Thus an act of cruelty, produced by a passion, the principle of which exists in every heart, and to the indulgence of which every one may be a victim, will create a general alarm, which will last until the punishment of the offender shall have transferred the danger to the side of revenge and enmity. The pain of the second degree is common to all, and there is besides the pain of sympathy which the sight of such offences produces in generous hearts.

2. If we now examine acts which result from the passion of one sex for the other, a passion to which nature has trusted for the perpetuation of our species, we shall see that where it attacks the security of the person, or domestic peace, the good which results from its satisfaction can bear no comparison to the evil it produces.

I shall here speak only of the crime which evidently compromises the security of the person—*rape*. Such an outrage to a modest woman is perhaps the greatest injury she can receive, and even to the most profligate an act of brutish violence cannot be a matter of indifference. But here the greatness of the alarm renders it useless to enter into a discussion of the primitive evil. The more the passion which causes the crime is general, the greater is the intensity of the alarm created by it. In times when laws had not sufficient power to repress it, and public opinion was not strong enough or sufficiently enlightened to brand it with infamy, it gave rise to acts of revenge which history has recorded. Whole nations were interested in the quarrel, and enmities were transmitted from generation to generation. The strict seclusion of Greek women, unknown in the time of Homer, began to prevail at a period of disturbance and revolution, when the weakness of the laws had greatly increased crimes of this description, and had spread a general alarm.

3. *Cupidity.*—In comparing the pleasure of illegal acquisition with the evil of loss by illegal means, the former will not generally be found equal to the latter. There are cases however where, if the evil

of the first degree only were taken into consideration, the amount of good would appear to be greater than the evil. In such cases the criminality results from the evil of the second and third degree. Let us take for instance the physical desire of getting some food to satisfy hunger. Suppose a beggar, urged by such a motive, steals from the house of a rich man a loaf which perhaps may save his life. Can the good he derives from the stolen loaf, be compared to the loss experienced by the wealthy individual? If such acts were permitted, however, there would be an end to the security of property; the fear of suffering from want and hunger would cease to be the strongest stimulus to the industry of the poor. The same general observation may be applied to examples less striking than this. A person embezzles some public money, he enriches himself without impoverishing any body. The loss is divided among so many that no one feels it, and still such dilapidations would in the end ruin any state. It is not then on account of the evil of the first degree, but for that of the second and third degrees that those acts are considered as criminal.

If the pleasures resulting from such powerful motives as the passion of love and hunger, but obtained against the wish of some of the interested parties, be so far from bearing any comparison with the evils which follow from them, the disproportion will appear greater where the motives are less strong and active.

4. The desire of self-conservation is the only one which still calls for a separate examination.

If the evil to be avoided be one, the infliction of which is directed by the law itself, such an evil must have been ordered from some powerful reason, such as the necessity of protecting by penalties the public security and the measures of Government. If the desire to escape a legal penalty be satisfied, the law so far is powerless. The evil of such a satisfaction results from the impotency, or as it were the non-existence, of the law. The evils, however, which are the consequence of the non-existence of laws are those which laws were enacted to prevent, that is, all the evils which may be inflicted by one man on another. No doubt the escape of one individual from the legal consequences of an offence committed by him, does not make the laws altogether powerless, but any instance of this kind is a proof of weakness, a first step towards destruction. It gives rise therefore to an evil of the second degree, to alarm, or danger, or to both; and if the laws should connive at the

evasion, they would be in contradiction with their professed object. to avoid a little evil they would permit a much greater one.

In cases where an individual repels an evil to which the laws did not want him to be subjected, every thing depends on circumstances. To remove or repel an evil is in itself perfectly justifiable, but perhaps in his endeavours to preserve himself from that evil, a man causes a greater one. Is or is not the evil done in his own defence greater than was necessary for that purpose? What is the ratio of the evil he has done to that which he has prevented? Would the evil prevented have been liable to be compensated by damages, if instead of preventing it at so great an expense the party concerned had submitted to it? Here are several questions of fact which the law must take into consideration to settle every point relative to self-defence. This subject belongs to the penal Code. It is sufficient here to observe, that whatever may be the evil of the first degree caused by an individual in self-defence there is no alarm, no danger produced. Unless he is attacked again and his security compromised, other men have nothing to fear from him.

CHAPTER X.

OF THE LIMITS WHICH SEPARATE MORALS FROM LEGISLATION.

The object of morals is to direct the actions of men so that they may produce the greatest possible sum of happiness. The aim of legislation is exactly the same. But though these two sciences tend exactly to the same end, the influence of one extends much farther than that of the other. Every action, public or private, is within the scope of morals. It is a guide which leads a person by the hand as it were through every detail of life, through every relation he may have with his fellow men. Legislation cannot do this, and should not attempt such a direct and constant intervention with the actions of individuals, if even it were possible. Morals prescribe to each person to do all that is advantageous to society including himself, but there are many acts useful to the community which legislation should not command. There are even many pernicious acts which it ought not to prohibit. Legislation in short has the same centre as morals but not the same circumference.

There are two reasons for that difference. 1st. Legislation cannot directly influence the actions of men but by penalties: and these penalties are in themselves evils which nothing but the production of a greater amount of good can justify. In many cases the enforcing of a moral precept by a penalty would produce more evil than good; that is, the evil of the penalty, or the attempt to inflict it, would be greater than the original evil. The necessary means to carry the law into execution would spread in society a degree of alarm greater than the evil it was the object of that law to prevent.

2. Legislation is frequently prevented from interfering by the danger of injuring the innocent when endeavouring to punish the guilty. This danger arises from the difficulty of defining the offence with clearness and precision. For instance, hardness of heart, ingratitude, perfidy and other vices which the popular sanction reprobates, cannot come under the power of the law because they cannot, like theft, murder, perjury, &c. be exactly and accurately defined.

But to distinguish more clearly the limits which separate morals

from legislation, let us consider the usual classification of moral duties.

Morals regulate the actions of man with respect to himself and others. What concerns himself alone is perhaps improperly called *duties to himself*, and the quality manifested by the accomplishment of those duties is known under the name of prudence. The part of his conduct which relates to his fellow men includes that class of actions designated as *duties to others*. There are two ways of showing regard to the happiness of others, one negative by abstaining from diminishing it, and one positive by endeavouring to increase it; the first constitutes honesty and the latter benevolence.

On these three points, prudence, honesty, benevolence, morals require the assistance of the laws, but not to the same degree nor even in the same way for each.

1. The rules of prudence seldom require any external assistance. If a man does not take good care of his own interests, it is not his intention, but his understanding which is in fault; if he does himself any harm it is only through error. The fear of injuring one's self is generally a sufficient check; it would be useless to add to it a legal, that is, an artificial, pain.

The contrary, it will perhaps be said, is demonstrated by facts. Gambling, intemperance, illicit connexions frequently accompanied with great dangers, prove that individuals have not always prudence enough to abstain from what is injurious to them.

To this I shall only answer generally, that in most cases the legal penalty, easily evaded, would be useless; and secondly, the evil produced by the penal law, would probably be greater than the evil of the fault itself.

Suppose, for instance, that a legislator thought himself authorized to suppress drunkenness by penal laws. It would be necessary to begin with enacting a number of rules to define drunkenness, that is, the degree of drunkenness which would constitute a punishable offence, and the mode of proving it. Intricacy of the law, first objection. The more easily that vice can be concealed the more severe the penalties must be to make up by the severity of examples for the great chance of impunity. Excessive severity of the laws, second consequence no less objectionable than the first. The difficulty to prove such an offence would be so great, that the law in question would be

almost a dead letter, unless measures were taken to encourage informers and keep up an army of spies; objection stronger than the two preceding ones. An offence of this nature, if an imprudence may be so termed, does not produce any alarm, whereas the pretended remedy would cause a general anxiety and oppression. Both the innocent and the guilty would have to guard against the accusations, true or false, of a body of vile informers who would render all social and familiar intercourse, except among very intimate friends, dangerous. Instead of suppressing one evil the law would thus have produced many.

It is true, that example may be contagious, and that an evil which would hardly be felt if limited to only a few individuals, may become intolerable by its extent. All that the legislator may do then is to subject the offence to some slight penalty *in case of scandalous notoriety*, this will be sufficient to turn against it the popular sanction.

In this respect legislators seem generally to have attempted too much. Instead of trusting to the prudence of individuals, they have treated them like children or slaves. In some celebrated codes a number of useless rules and prohibitions are to be found with regard to marriage, pains against celibacy; sumptuary laws regulating the form of dress, the expense of entertainments, the furniture of houses and ornaments of women; infinite details relating to lawful and prohibited food, ablutions, purifications, and a thousand puerilities which, besides imposing unnecessary and burdensome duties, tend to stupify a nation by claiming its respect for ridiculous absurdities over which is thrown a mysterious veil which protects them against the free exercise of private judgment.

But more unfortunate still are those states where it has been attempted to maintain by penal laws the uniformity of religious opinions. The choice of a religion can only belong, and should be left, to the prudence of individuals. If they are persuaded that their eternal happiness is dependent on a certain form of worship, on a particular article of belief, what can the legislator oppose to such powerful motives? His interference by pains and penalties can only make martyrs or hypocrites. This truth is now generally acknowledged, and the principle of religious toleration needs not here be further insisted upon; but in tracing the limits of legislation it is necessary to mention those which it is most important not to overlook.

As a general rule, it is better to leave to individuals the greatest possible freedom in all cases where they can only hurt themselves; they are the best judges of their own interests. If they make mistakes they will soon find them out and retrace their steps.

2. Let the power of the law interfere only to prevent men from injuring each other, that is, to maintain honesty. There indeed laws are necessary; there the application of pains and penalties is truly useful, because the severity exercised on one becomes the security of all. This adds to the influence of the natural relation between prudence and honesty, which is such however that our properly understood self-interest would never leave us without a motive to abstain from injuring our fellow men.

Let us stop a little on this point. I say that, independently of religion and of laws, we have always some natural motives, i. e. motives of direct self-interest, to attend to the happiness of others. 1st. Pure benevolence, this sweet and pleasing feeling which we like to enjoy, and which inspires us with a general disposition of doing good to other men. 2nd. Private affections which exercise their influence within our domestic circle or that of our friends. 3d. Desire of a good reputation and fear of blame. This is a kind of commercial calculation; to pay that we may have credit, to speak the truth that our word may be trusted, to serve that we may be served. Hence the popular proverb that honesty is the best policy.

A man enlightened with regard to his own interest, would not commit a secret crime, either from fear of contracting a shameful habit which would sooner or later betray him, or because secrets to be kept from the searching looks and conjectures of our fellow men leave in the heart a degree of anxiety which tends to destroy all pleasures. Whatever he might acquire at the expense of his security would not be worth such a price, and if he cares for the esteem of men the best pledge of obtaining it is to have his own. The pleasure of *esteem-worthiness*, as distinct from that which we derive from esteem actually obtained, is a motive of powerful influence with men whose moral education has been successfully attended to.

In some cases the morality of an act depends altogether on the law. This is the case with reference to property. A mode of selling or buying may be contrary to honesty in one country and not so in another. Such are also state offences; the state exists only in conse-

quence of the law. The duties of morality cannot accordingly be completely known and settled until after the law has been enacted. For instance, there are countries where it is a crime to serve in the army of a foreign power, while in others this service is legitimate and held honourable.

3. With regard to benevolence a distinction is necessary. The law may be stretched very far for general purposes, such as in the relief of the poor, &c. but in the details private morality must be trusted to. Benevolence has its secrets, and finds exercise in relieving sufferings so sudden, so unforeseen, so secret, that the law could never reach them. Besides, benevolence must be free to be energetic, or rather to exist at all; if the same acts should be commanded they would cease to be acts of benevolence, their very nature would be altered. A moral and religious education constitute here the necessary complement to legislation, and strengthen the most amiable principle of human nature.

However, instead of having done too much in this respect, legislators have not done enough; they should have made it an offence to refuse or withhold a service required by humanity when it is easy to render it, and some great misfortune is the result of the refusal. To abandon on a lonely path a wounded person without endeavouring to give him assistance; to omit giving a warning to persons who are unconsciously handling poisons; not to help a man out of a ditch into which he has fallen and out of which he cannot extricate himself; not to save, when this could be done without any great trouble, difficulty or risk, the lives of persons in danger; in these and other similar cases could any fault be found with a penalty which would expose the offender to the shame he deserves, or render him responsible in his fortune for the evil he might easily have prevented?

I may observe also, that legislation might have gone further and extended its protection to the well being of inferior animals. There are no doubt good reasons to make use of them for our tables; we are the better and they not the worse for it, as they have not like us long and painful anticipations of the future, know not the violent death which awaits them, and as that death may always be less painful than that which they must suffer in the ordinary course of nature. But what can be said to excuse the useless torture to which they are some times submitted? Among all the reasons which I might give in favour of

making it a legal offence to be guilty of any gratuitous cruelty to animals, I need only mention that which relates to the special subject now under consideration. It would be the means of cultivating a general feeling of benevolence, of rendering men more humane, or at least of preventing that brutal depravation which, after having sported with the sufferings of animals, would fain seek excitement and an atrocious pleasure in the sufferings of human beings.

CHAPTER XI.

INSTANCES OF FALSE REASONING IN LEGISLATION.

From the preceding illustrations of the principle of utility results a logic of legislation which may be resumed in a few words.

What is it to give a proper reason for a law? It is to allege the good and evil consequences which this law tends to produce, the former being arguments in its favour, and the latter objections to it, and to show that the amount of the one greatly exceeds that of the other. It must not be forgotten that good and evil are nothing more than pleasure and pain.

What is it to give a *false reason*? It is to state for or against a law any thing else but its good or bad effects. Whatever truth there is in morals, whatever good there is in law proceeds from the principle of general utility, but though often more or less attended to in practice from instinct, it has frequently been opposed by argument.

I will here mention some of the chief errors which a want of attention to the principle in question has caused in the reasonings of legislators or philosophers.

1. Antiquity of a law has often been pleaded in favour of that law, but *antiquity is no reason*. It may indeed establish a prejudice in favour of a law but it is not a *reason in itself*. If the law alluded to has contributed to public happiness, the older it is the more easily its good effects may be ascertained and its utility directly proved.

2. *Religious authority is no reason*. It is seldom that this mode of reasoning is now resorted to by legislators, and it is obviously inapplicable in a country where different religions are tolerated on a footing of equality.

If a law be supposed to proceed from the Almighty, it must be the work of supreme wisdom and goodness. Such a law could have for its object nothing but the most eminent utility; if the civil legislator wants it to be enforced, let him bring forward that utility in justification of the law in question.

3. *Reproach of innovation is no reason.* To reject all innovation is to reject all progress. In what state should we be if that principle had been adhered to till now? whatever exists has had a commencement, every institution has been an innovation.

4. *Arbitrary definition is no reason.* Nothing is more common among lawyers and political writers than to ground arguments on arbitrary definitions. They give to a word a particular sense different from its usual meaning, and by using that word as it was never used before, they deceive their readers with an appearance of depth and mystery. Montesquieu states, that "the laws are *eternal relations derived from the nature of things*," and by this definition merely renders more obscure an idea which before appeared tolerably clear to all. A little farther the same author defines the law in general to be "human reason in so much as it governs every nation of the earth," so that so many contradictory, cruel and absurd laws, constantly changing, must still be "human reason!" Reason far from being identical with the law is unfortunately too often opposed to it.

This idea of "relations" has betrayed Beccaria himself into an absurdity. To question a man with a view to ascertain whether he is innocent or guilty is, he says, to compel him to accuse himself. This he thinks objectionable, and why? Because it is "to *confound all relations*." What can that mean? To enjoy, to suffer, to give pleasure or inflict pain, are expressions readily understood, but *to respect or confound all relations*, are terms which can convey no definite meaning to the understanding.

Rousseau, not satisfied with the above definition, has given another which he announces as a great discovery. "Law," he says, "*is the expression of the general will.* If so, there can be no law where the whole nation has not in a body expressed its opinion; there are no laws but in an absolute democracy; all existing laws are null and void.*

* Law is nothing but a rule of action enjoining what the Legislator wants to be considered as right, and prohibiting what he wants should be considered as wrong. If any particular law agrees with the principle of general utility, it is just; otherwise it is unjust. In the latter case the obligation to obey it or not, depends again on the same principle of utility. The question is whether the evil of obedience be greater than that of resistance with the risk of personal oppression, civil war, &c.

5. *A metaphor is no reason.* Blackstone, so much an enemy to all reform as to deprecate the introduction of the English language into English courts of justice, represents law as a castle, a fortress, which every alteration tends to weaken. He does not, it is true, give that metaphor as an argument, but why make use of it and thus lay hold of the imagination of his readers, prejudice them against all reform, and inspire them with fear and apprehension of any innovation in the laws?

A man's house, it is said, *is his castle.* But if so at night, why not in the day time? If it be an inviolable asylum for the proprietor, why not for any one he chooses to receive in it? The course of justice is sometimes impeded in England by this puerile notion.

In Roman Catholic countries a church is *the house of God.* This metaphor has led to a church being considered as an asylum for criminals. It was supposed to be a want of respect to the Almighty forcibly to remove from his house those who had taken refuge in it.

The expression of *mother country* has created a number of prejudices, and given rise to many false reasonings in the questions concerning a colony and its metropolis. Imaginary duties have been imposed on the former on the ground of its pretended filial relation to the latter.

6. *Fiction is no reason.* I understand by fiction an assertion notoriously false, and on which an argument is grounded as if the assumed fact were true.

The celebrated Cocceiji, editor of the Code Frederick, furnishes an instance of this mode of reasoning, in what he says of Wills. After many vague remarks on Natural Law, he approves of the legislator leaving to individuals the right of making a will. Why? "*Because the heir and the late testator are one and the same person, and consequently the former must continue to enjoy the property of the latter.*" It is true, that elsewhere he brings forward some arguments connected with the principle of utility, but he does so only in his preface. In the body of the work itself, the real, the judicial reason given is the *identity* of the survivor with the deceased!

English jurists to justify in certain cases the confiscation of property, have made use of an argument somewhat similar to that of the Chancellor Cocceiji. They have imagined a corruption of the blood which stops the course of legal succession. A man has been punished with

death for high treason: the innocent son is not only deprived of his father's property, but he is not allowed to inherit that of his grandfather, because the channel through which it was to pass down to him is said to have been corrupted.

Hobbes' Leviathan, now little known and detested by prejudice as the code of despotism, establishes all political society on a pretended contract between the people and the sovereign. The nation by that contract has given up its natural liberty which was productive of nothing but evil, and has deposited all its powers in the hands of the prince. All wills are united or rather annihilated in his. What he wills is supposed to be the will of all his subjects. When David took the life of Uriah, he did so with the implied consent of Uriah. The latter had beforehand agreed to whatever the former might be pleased to do with him. In this system the prince can sin against God, but not against men, since whatever he does, proceeds from general consent. One cannot think of resisting him, it would be resisting one's self.

Locke, whose name is as dear, as that of Hobbes is odious, to the friends of liberty, also grounded the theory of government on a contract. He affirms that there is a contract between the prince and the nation. that the prince engages to govern according to law and promises to have general happiness for his object; and that on its side the nation binds itself to obey so long as the prince fulfils the conditions upon which he has received the crown.

Rousseau has rejected with indignation the idea of this mutual contract between the prince and the people. He has imagined a *Social Contract* by which each individual binds himself with respect to all and which is the only legitimate basis of government. Society only exists by this free association.

These three systems have this in common that they begin a political theory with a fiction; as none of those contracts is really in existence any where but in the imagination of the author. Not only no trace of it is found in history, but proofs to the contrary are there met at every step.

That of Hobbes is evidently false. Despotism has been every where the result of violence and false religious notions No nation ever gave a deliberate consent to subject itself to all the cruel and capricious fancies of the sovereign.

Rousseau's *Social Contract* has been looked upon with more indul-

gence, because men are easily led to approve of the logic of a system which establishes what they like above all other things, liberty and equality; but it is equally fictitious. When was that universal convention agreed to? What are its clauses? In what language has it been recorded?

Locke's contract has a more specious appearance, because there are monarchies in which the sovereign really enters into some engagements on ascending the throne, and binds himself to certain conditions imposed upon him by the nation he is going to govern

This contract however is also a fiction. The essence of a contract consists in the free consent of the parties. It implies that all the objects of the engagement are specified and known. But if the prince on ascending the throne be at liberty to accept or refuse, is the nation equally free? Are not many individuals concerned in that pretended contract who never heard of it, or never were asked for their consent to it, or never could have refused their sanction without risk of fortune and life?

The happiness of mankind must not be made to depend on a fiction. The true foundation of government is the immense benefits men derive from it; without government there can be no security, no property, no industry. It is by comparing the practice of Governments with their object that we may justly argue about their rights and obligations, and not by referring to pretended contracts which can only tend to produce interminable disputes.

7. *A fancied notion is no reason.* Nothing more common than to say: *reason prescribes*, &c. but what is that reason? If it be not the distinct view of some good or some evil, it is a mere fancy of the person who is thus speaking.

The right of a father over his children, says Cocceiji, is founded on reason, since 1st. children are born in their father's house. 2dly. They are born in a family of which he is the head. 3dly. They are his own flesh and blood. From these reasons among others, he infers that a man of forty must wait for the consent to his marriage of an old man now perhaps in his dotage.

These three reasons agree in this, that they make no reference to the advantage of the parties.

The first reason is grounded on a circumstance which may not always be true. If a man's child be born on a ship, in an inn, or in

a friend's house, then, according to our author, the first basis of paternal authority does not exist.

The second reason has no distinct meaning, or is a mere repetition of the first. Is the son of a man who lives in his father's, in his eldest brother's, or in his master's house, born in a family of which his father is the head?

The third reason is equally puerile. If it gives any right to the father it should give much more to the mother.

8. *Antipathy and sympathy are no reason.* It is particularly with reference to the penal law that men argue from antipathy; antipathies against acts considered as criminal, against persons supposed to be guilty, against such and such punishment. This principle has long held a tyrannical sway over that part of legislation. Beccaria first ventured to attack it with irresistible weapons, but if he did much to destroy the usurper, he did little to find a substitute for it.

It is often the principle of antipathy which speaks of an offence as *deserving* a punishment, and the principle of sympathy according to which a certain act is said to *deserve* a reward. This expression of *desert* is very apt to lead to error, because it tends to keep our attention from the principle that, in appreciating any given act, we should look chiefly to its probable consequences.

When I say that *sympathies and antipathies are no reason*, I mean those of the legislator, because those of the community over which he legislates must be by him carefully attended to, although perhaps fanciful and even pernicious. The strength of the prejudice is the measure of the regard to be paid to it; otherwise a feeling of antipathy would be excited against the law, and hence a disposition to prevent its execution, dislike to the Government, riots, insurrection, civil war. The legislator must yield to the violence of a current he cannot stop: it is not the sympathies or antipathies of the people which are then the principles of his conduct, but he has in view to avoid the evils which his opposition might produce.

The legislator however must not be a slave to the prejudices of those he governs. Between an imprudent opposition and a servile condescension there is a safe and honourable medium: it is to attack those prejudices with the only weapons which can conquer them; example and education. In this however the legislator must not show himself

too openly, he might compromise himself with the ignorant. Indirect means will better answer his purpose.

9. *Begging the question is no reason.* Begging the question consists in making use of a disputed proposition as if it were granted, or had been proved.

This false mode of reasoning insinuates itself in morals and legislation under the veil of *sentimental* or *passionate* terms. *Neutral* terms are those which express merely the thing in question, without implying at the same time any notion of praise or blame

If I should say for instance that such an object of *luxury* is good, my proposition would astonish those who have been accustomed to connect an idea of blame with the word luxury. What am I to do to examine this particular question without awakening any dangerous association? I must make use of a *neutral term*, as for instance, *such a way of spending one's income is* good. As this does not excite any opposition grounded on prejudice, the question may be examined with impartiality. When Helvetius asserted that all actions had self-interest for their motive, a great outcry was raised against him without even listening to what he had to say in favour of his assertion. And why? Because the word "self-interest" taken in its vulgar sense, appeared to exclude all motives of pure affection and benevolence.

How many arguments in politics are grounded on nothing but passionate terms! Blackstone admires in the British Constitution the combination of the three forms of government, and concludes that it must possess all the advantages of Monarchy, Aristocracy, and Democracy. How is it that he did not perceive the very reverse of this might be as logically inferred from his arguments, viz. that the British Constitution must be liable to all the objections of Monarchy, Aristocracy, and Democracy?

The word *independence* has ideas of dignity and virtue connected with it, while the term *dependence* implies some inferiority. The admirers of the British Constitution have therefore praised the *independence* of the three powers composing the legislature, and held it up to the admiration of all as a master-piece of policy, the most remarkable feature in that government Those, on the contrary, who do not approve of that system of government, have found fault with it for the *dependence* of one of those powers Neither the praise nor the censure contain any reasons.

In point of fact the supposed independence does not exist.

Have not the King and many of the Lords an undoubted power over the election of the Members of the Lower House? Has not the King the right to dissolve it at a moment's notice? Does he not exercise in it a direct and powerful influence by the honorary and well paid appointments he can confer or cancel at pleasure? On the other hand, is not the King in the dependence of both Houses, and particularly of the House of Commons, since he could not maintain himself without money and without an army, and these are altogether within the power of that House to grant or refuse? Can the House of Lords be said to be independent when the King can turn the votes in his favour by an addition of new peers, and besides exercises an influence in it by the prospect of promotion to a higher rank in the peerage, or on the bench of the Bishops?

Instead of arguing on a vague term, let us attend to facts. It is the reciprocal dependence of the three powers which produces their concord, subjects them to fixed rules, and gives them a regular and steady plan of conduct. Hence arises a necessity of respect, allowance and conciliation, from one to the other. If they were absolutely independent, whenever they were at variance it would be necessary to have recourse to force; and as well might the government be at once changed into a pure democracy, which is nothing else but anarchy.

Here is one more instance of erroneous reasoning founded on a passionate term.

When building a political theory on the basis of *national representation*, nothing appears more natural than that every member of the community should have a share in the government; hence the supposed justice of *universal* suffrage. Besides, the elected members of the legislature being merely representatives of their constituents, it seems also natural to keep them in the dependence of those constituents, and for this purpose to have new elections repeated as frequently as possible.

To decide this question according to the principle of utility, we must look to consequences and not to words. To elect the members of a legislative assembly, it seems none should vote but those who may be supposed to have the confidence of the nation; otherwise the nation itself will want confidence in the assembly.

Those who cannot be considered as having the necessary degree of

political integrity and instruction to make a proper use of the right of voting, cannot have the confidence of the nation. Political integrity is not to be expected from those who are by their poverty subject to the temptation of selling their votes, have no fixed place of abode, or have been branded with infamy. The necessary degree of instruction will not generally be found in women whom their domestic life keeps away from public affairs, in children and adults below a certain age, in those who from their indigent circumstances have not had the advantage of receiving even the first elements of instruction.

It is on these principles, and others of the same kind, that the qualification necessary for an elector might be settled; and it is equally from the advantages or otherwise of a frequent renovation of legislative assemblies, that the period, during which they should be allowed to continue their existence, should be determined.

10. *An imaginary law is no reason.* The expressions *natural law*, *natural right*, are two kinds of fictions or metaphors, which play such an important part in books of legislation that they deserve a separate examination

The original meaning of the word *law* is, and so it is actually understood by the vulgar, the will of the legislator. The law of nature is a figurative expression; nature is personified and her supposed intentions are called laws. In this sense all the general inclinations of men, all those which appear to exist independently of the human society, and which must have existed before the establishment of political and civil laws, are called *laws of nature*. This is the true meaning of the word. But it is not in this sense it is used. Authors have used that word as if there was actually a code of natural laws. They appeal to those laws, they quote them, they oppose them to the laws enacted by the legislator, as if they were really in existence; they do not perceive that those laws exist only in their imagination; that those who assume the existence of that code contradict each other with regard to its provisions; that they affirm without proof, and that by reasoning in this way, no progress can be made in political or moral discussions, since every one may say all he chooses of laws merely imaginary

Pleasure and pain and virtuous dispositions are natural to man, but to call those feelings and dispositions *laws*, is to introduce a false and dangerous idea, and a contradiction in the language, since laws have to

be made to repress the action of the feelings alluded to. It is against the most natural dispositions that the severest laws must be enacted. If there was a law of nature which of itself directed men towards their common good, other laws would be useless.

Blackstone says, the duty of parents to provide for the maintenance of their children is a principle of natural law, an obligation imposed not only by nature herself, but by their own proper act in bringing those children into the world. Montesquieu, he adds, has a very just observation upon this head, that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children. (Book 1st, Chapter 16.)

Parents are *disposed to maintain* their children, or parents *ought to* maintain their children are two different propositions. The former does not imply the latter, or vice versâ. There are, no doubt, strong reasons to impose on parents the obligation of maintaining their children. But why not state those reasons? Why refer to what is called the *law of nature*. What is that law which requires to be supported by a secondary law from another legislator? If that natural obligation existed, as Montesquieu says, far from being a proper basis for the institution of marriage, the latter would become useless; at least as far as this supposed object of that institution is concerned. One of the objects of marriage is precisely to make up for the insufficiency of natural affections. It converts into an obligation that parental affection which would not always suffice to cause parents to incur all the expense and trouble of properly maintaining and educating their children.

Men take very good care to provide for their own wants so it is unnecessary to compel them to do so. If the disposition of parents to maintain their children was universally and equally strong, legislators would never have thought of making an obligation of it.

Means and faculties are indeed natural to men, but to call them natural rights is to make use of a very injudicious expression, since rights are established to secure the exercise of those means and faculties. The *right* is the guarantee, the *faculty*, the thing guaranteed. How can we reason with correctness and accuracy if we use the same term for things so distinct?

Natural right is often spoken of as in opposition to the law. It is for instance, sometimes asserted that law is bound not to violate it.

But in this antilegal sense the word right is the greatest enemy to reason and Governments. Who can argue with a fanatic armed with a natural right, equally unintelligible and unmanageable, which he understands and applies as he chooses, and which is as sacred in his eyes as an article of faith? Instead of examining laws with reference to their consequences, such men compare them with that pretended natural right, that is, substitute for reasonings founded on experience, the idle fancies of their own brain.

To prosecute our own happiness is asserted to be a natural right. It is no doubt a natural disposition, but can it be considered as a *right*. The man who murders another prosecutes what he considers his own happiness, has he a right to do so? If not, why make use of an expression which implies that he has? Is there in it any tendency to make men wiser and happier?

If nature has enacted such and such a law, those who refer to it with so much confidence, those who have modestly taken on themselves to be its interpreters, must think that nature has had good reasons to enact that law, and has provided some sanctions for it; would it not be shorter and more satisfactory to state those reasons and those sanctions* instead of presenting to us the will of that unknown legislator as a law which we are bound to obey without inquiry?

The language of error is always vague and obscure; a great abundance of words hides the want or incorrectness of ideas. The language of truth on the contrary is simple and clear; the same terms always express the same meaning. Between two different modes of action do you wish to know which should be preferred? Calculate the probable good and evil consequences of both, and decide in favour of that which promises the greatest amount of general happiness.

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* The true natural laws are known by their natural sanctions. If a man remains for many days without food he will be starved to death; if on the contrary he makes an immoderate meal he will have an indigestion. The starvation in one case and the indigestion in the other, are the natural sanctions of that law of nature which enjoins a temperate use of food.

II.

PRINCIPLES

OF THE

CIVIL CODE.

PRINCIPLES OF THE CIVIL CODE.

INTRODUCTION.

Most jurists distinguish the Civil from the Penal Code, by stating that the former contains a description of rights and obligations, and the latter a description of offences and punishments, but this distinction is not clear and satisfactory: there is between those two branches of legislation an intimate connection which makes it often difficult to state the difference between the two.

A Civil law is that which establishes a right, a Penal law that which, in consequence of the right thus established, orders that the person who violates it shall suffer such and such a punishment. The law which would merely prohibit murder would only be a Civil law, that which orders that the murderer shall suffer death is a Penal law. The latter includes the former, because to decree the punishment of death against a murderer is to prohibit murder.

The Civil Code explains what constitutes property, the different legal modes of acquiring it, &c. but some of these explanations are intricate; misunderstandings occur; a person believes he has a right to some property which another man claims as his. Both may be sincere in their claims; and from these opposite claims arises the matter of a civil suit, in which the right of one of the parties will be confirmed and the claim of the other disallowed. The latter, if in possession of the property in dispute, will have to restore it, but is not liable to any penal infliction.

It thus appears, that in the Civil Code might be placed all the laws, which having no penal clauses, merely prescribe the simple obligation to give up an erroneous claim, or restore another man's property which has been taken possession of in good faith. The penal code would thus include only the laws which inflict a punishment beyond that of simple restitution; for instance, fine, confinement, hard labour, &c.

It should never be forgotten, however, that these two Codes are only one in their nature and object; they are divided only for the sake of convenience.

PRINCIPLES OF THE CIVIL LAW.

BOOK I.

OBJECTS OF THE CIVIL LAW.

CHAPTER I.

OF RIGHTS AND OBLIGATIONS.

The object of the legislator is to distribute among the members of the community, 1st. Rights; 2d. Obligations.

Rights are in themselves advantages, benefits for those who enjoy them. Obligations on the contrary are duties, burdens for those upon whom they are imposed.

Rights and Obligations, although distinct and opposed in their nature, are simultaneous in their origin and inseparable in their existence. The Law can grant no advantage to one without imposing at the same time some burden on another, that is, no right can be created in favour of one without a corresponding obligation on the part of another to respect it. How is a right of property given me over a portion of ground? By imposing on others the obligation not to disturb me in my possession. How is a right of command over a province granted to me? By imposing on the inhabitants of that province the obligation of obeying my orders.

It is natural for the legislator to grant rights with pleasure since they are benefits, and to impose obligations with regret, since in themselves they are evils. According to the principle of utility he should never impose a burden except to create a greater corresponding benefit.

Obligations are checks on liberty: the acts which thus become criminal, would otherwise be guiltless and unpunishable. The law creates an offence by a positive command as by a prohibition.

Checks on liberty are unavoidable. It is impossible to create rights, to impose obligations, to protect life, reputation, property, liberty itself, except at the expense of liberty. But every such check is followed

by a natural feeling of regret; besides, a number of restrictions and annoyances result from its peculiar mode of operation. None should accordingly be imposed without special and sufficient reason. Every man who proposes a coercive law, is bound to prove not only that some benefits will follow from it, but that those benefits are superior to the evils inseparable from all law and from the proposed law in particular.

This apparently evident proposition, that every law (except that which rescinds a restrictive law) is contrary to liberty, is not however generally assented to. On the contrary, some warm friends to liberty, more zealous than enlightened, think themselves bound in conscience to oppose it, that is, they pervert the language and attach to the word liberty a meaning of their own. They define it "a *power of doing whatever cannot interfere with the rights of others.*" This however is not the usual sense of the word, the liberty of doing evil is still liberty. Are not the insane and the wicked said to be deprived of their liberty to prevent their abusing it? So many verbal disputes are the result of thus arbitrarily altering the ordinary sense of common expressions, that it is important to avoid such a cause of confusion. Let us, in doing this, endeavour to lay down some true principles of legislation.

The only object of Government should be the greatest possible happiness of the community, that is, of all the individuals composing it.

The happiness of an individual is in proportion to the extent and number of his enjoyments, and to his freedom from pain.

To individuals should be left the care of their own enjoyments. The chief duty of Government is to protect man against pain. This is done by conferring rights on individuals, right of personal security, right to property, &c. To these rights correspond as many offences. The Law cannot create rights without imposing obligations, nor impose obligations without creating offences. The violation of a right is an offence. All orders or prohibitions of the legislator are checks to liberty. Individuals must give a portion of their liberty for the rights he confers upon them, but even under a bad government there is no proportion between the acquisition and the sacrifice. A government comes nearer and nearer to perfection as the former is greater and the latter more inconsiderable.

CHAPTER II.

DISTINCT OBJECTS OF THE CIVIL LAW.

In the distribution of rights and obligations, as I have said before, the legislator has for his object the happiness of the community. This appears to depend on four distinct circumstances,

Subsistence.
Abundance.
Equality.
Security.

The object of the law thus must be four fold, viz. to provide for subsistence, keep up abundance, favour equality and maintain security. The limits which seperate these are not always easy to determine; but it is sufficient to justify this division that it is the most complete, and that in several circumstances each of these ends has to be separately considered.

Subsistence is included in abundance, but they must be carefully distinguished, because the laws may go much farther for one than they would be justified in doing for the other.

Security admits of as many distinctions as there are acts which may be contrary to it. Security relates to person, honour, property, condition. Acts prohibited by the law as contrary to security are *offences* or *crimes*. Security is the chief object of the law.

I have put equality among the objects of the law, because, in an arrangement intended to procure to all men the greatest possible happiness, there can be no reason for the law to endeavour procuring more to one man than to another. On the contrary, there are many reasons not to do so; the advantage thus obtained would not compensate the loss it would occasion.

Equality may be favoured either by protecting it where it exists, or by endeavouring to establish it where it is not. But here the greatest caution is necessary. A single error might disturb the peace of society.

It will perhaps be supposed that *liberty* should have been reckoned among the chief objects of the law, but liberty is included in security.

Personal liberty is security against a certain description of injuries affecting the person. As for political liberty it is another branch of security, viz. security against the injustice of government officers. Whatever belongs to this object does not belong to the *Civil* but to the *Constitutional Code*.

CHAPTER III.

RELATIONS BETWEEN THE DIFFERENT OBJECTS OF THE LAW.

These objects are very distinct in the mind but they are not so in practice. The same law may embrace several of them because they are often united. What for instance is done for security, is done also for subsistance and abundance.

But there are cases in which those different objects cannot be reconciled so that a measure suggested by one will be condemned by the other. Equality, for instance, would require a certain division of property which is not compatible with security.

When such a contradiction exists between two of the objects of the law, some means must be found to decide which should be preferred; otherwise these principles instead of guiding us in our investigations would only cause an increase of confusion.

It may be seen at once that subsistence and security are equally essential; abundance and equality are not of the same importance. In fact without security, equality would not last a day, and without subsistence, abundance cannot exist. The two first objects are life itself; the two last the comfort of it.

In legislation, the most important object is security; even if no laws had been enacted relative to subsistence, one may easily conceive no body would have neglected it. But if no direct laws had been prepared to insure security, it would have been useless to make any to procure subsisrence. Give orders to cultivate and to produce and you have done nothing; but insure to the cultivator the produce of his industry and perhaps you have done enough.

Security, we have said, has several branches; some of those branches must yield to others. Liberty, for instance, must yield to considerations of general security, since no laws can be made but at the expense of liberty.

The greatest good can thus be obtained only by the sacrifice of some good inferior to it. To distinguish which deserves the preference, constitues the difficulty of the art, as this distinction cannot always be made without an intricate calculation.

Equality should be favoured only when not opposed to security, when not interfering with any expectations produced by the law, when not disturbing the distribution actually established.

If all kind of property was equally distributed by a flat of the legislator, the consequences would be most lamentable. Those who at first would appear to have been favoured, would in the end suffer as much as those who had lost by the division. If the share of the industrious was not larger than that of the indolent, there would remain no inducement to industry.

To lay down as a general principle that men are equal in rights, is to render all legislation impossible and to destroy all subordination. The son then has the same right to direct and punish his father as the latter has to direct and punish his son; a magistrate has no more legitimate authority over an offender than the latter has over him. No doubt those who adopt the principle in question, do not pretend to establish this absolute equality; they use the word equality in a peculiar and limited sense, but do they not run the risk of their theories being understood by the multitude according to the plain and ordinary meaning of the words in which they are expressed?

CHAPTER IV.

OF LAWS RELATIVE TO SUBSISTENCE.

WHAT can law do for subsistence? Nothing directly. All it could do would be to create *motives*, that is pains and rewards by the influence of which men would be induced to provide subsistence for themselves, but these motives have been supplied by nature from which they have received sufficient energy. Before any laws had been enacted, *wants* and *enjoyments* had done all that the best laws could effect in this respect. Wants accompanied with sufferings and followed by death itself, commanded labour, stimulated energy, inspired providence, called into action all the faculties of man. The enjoyments, inseparable from every satisfied want, constituted an inexhaustible fund of rewards for those who, in labouring, fulfilled the end of nature.

The influence of the physical sanction being sufficient in this respect, that of the political sanction would be useless; the natural rewards and punishments cannot be evaded; there is neither delay nor favour in their distribution. What could be added by human laws to the constant and irresistible action of these natural motives?

But laws indirectly provide for subsistence in protecting men while they labour, and insuring to them the produce of their industry; security for the labourer, and for the produce of his labour, such is the benefit of the law; it is above all price.

The third, proposition can hardly be considered as doubtful. Suppose on the one hand a thousand cultivators in easy circumstances, and on the other a king or the richest prince in the world. It is probable that the latter may enjoy more happiness than any of the former, but no one could for a moment imagine his happiness to be as great as that of the whole of those cultivators, or, what comes to the same thing, a thousand times equal to that of each of them. The man born in riches does not know their value so well as he who has worked out his own fortune. It is the pleasure of acquisition rather than that of possession which is highly enjoyed.

The fourth and fifth propositions follow from those which precede them.

II. Let us pass to the second case and examine the effect of a portion of wealth when first falling into the hands of a person. Remark that expectation should not be taken into consideration. We must suppose this augmentation of fortune to come suddenly without having been expected.

A portion of wealth may be so much subdivided as to give no additional happiness to those who will receive one of the minute parts,* but generally, the more the distribution of a portion of wealth will let equality subsist between sharers of equal fortunes, the greater the total amount of happiness will be.

Between sharers of unequal fortunes, the more the distribution would tend to put them on an equality, the more happiness would result from it.

These propositions cannot be demonstrated, but it is hardly possible to reflect upon them and entertain any doubt as to their being generally true. Suppose two men have each twenty thousand Rupees. If a portion of wealth equal to ten thousand Rupees be divided equally between the two, it will increase by one *fifth* the fortune of each: if the whole were given to one man the first half would add

* This principle differently stated—a loss of wealth may be subdivided among many individuals so that it will cause hardly any pain to any of them,—has led to the establishment of Insurance Companies, and to the granting of indemnities by some princes to those of their subjects who had suffered from natural calamities or the miseries of war. The same principle might, with proper precautions, be applied to insurance against robbery and theft.

one *fifth* to his fortune, but to that fortune thus increased the second five thousand Rupees would only add one *sixth*. This alone would make it desirable that the second portion should go to the other man, instead of going to the one who has already received the first portion. But, besides, the larger the income of a man, and the more that income, or part of it, is applied to the satisfaction of fanciful wants which have less and less claim to be considered as *necessaries*.

On the other hand if we consider two parties, one of which has twenty thousand and the other a hundred thousand Rupees, it is obvious that, on both the principles stated above, the portion of wealth amounting to ten thousand Rupees, would produce more happiness if given to the poorer man than if divided equally between the two.

III. Let us pass to the third case, that is, examine the effect of a portion of wealth escaping from the hands of the parties concerned. Here again we must put expectation out of the question and suppose that loss to be sudden. Almost every loss in fact is sudden as men in general expect to keep what they have; this expectation is grounded on the ordinary course of things.

1st. The loss of a portion of wealth will produce a diminution of happiness greater or less according to the ratio of the loss to the remaining portion.*

2nd. Fortunes being equal, the greater the number of persons among whom a loss is distributed, the less is the total diminution of happiness.

3rd. Fortunes being unequal, the diminution of happiness which would result from the loss of a portion of wealth, would generally be less in proportion as that loss was distributed so as to bring those fortunes nearer to equality, supposing of course there was no objection on the score of a violation of security, that is, the loss not creating more alarm in one case than in the other.

The truth of the first proposition is evident. That of the second follows from the fact of the addition of each successive equal portion of wealth to a man's fortune adding less and less to his happiness.

* This is one of the evils of gambling. I have 1,000£ and I stake 500; if I lose, one half of my fortune is gone; and if I win, only one third is added to it.

The third proposition rests on the comparative minor importance of a loss of fixed amount to a large income, and on the consideration that, between men of unequal fortunes, the excess of income of one over the others, is applied to the satisfaction of wants less and less pressing. Suppose two men, one of whom has one thousand Rupees income and the other only five hundred; a sudden loss of 400 Rupees income occurs to the richer of the two. I say that the loss of happiness is not so great as if each had lost 200 Rupees income, because in the first case, one man loses two *fifths* of his income and the latter nothing; in the latter instance, one man would still lose two *fifths* of his income while in addition to this the other man would lose one fifth too. Besides, the richer man will still be able to obtain all the comforts of the poorer and more, and if the loss had been equally divided, the poorer would have been deprived of comforts which approximate more to necessaries than those lost by the richer individual. If the income of the poorer was barely equal to his subsistence, the case would of course be much stronger, since any diminution of his income, instead of merely depriving him of comforts, would reduce him to starvation. If, on the other hand, the loss constituted a large portion of the richer man's fortune, and part of it might be divided among such a large number of men of moderate fortunes that the share borne by each would be very small, the above proposition might of course, require to be modified.

The above principles, which have nearly the evidence of Mathematical axioms, show what should be the tendency of a good system of legislation. So many natural causes tend to produce inequality in the enjoyments and the happiness of men, that a wise legislator should, at least, do nothing which may have the effect of adding to that influence, and of carrying that inequality to an extreme degree.

CHAPTER VII.

OF SECURITY.

Security is the first object of the law. This invaluable blessing, sure proof of civilization, is entirely the effect of legislation. Without laws, no security, consequently no abundance, nor even certainty of subsistence can exist. The only possible equality in such a state is an equality of misery.

Properly to estimate the value of security, it is only necessary to consider the condition of wild tribes. Constantly struggling with famine, which sometimes in a few days destroys a whole people, the difficulty of procuring subsistence produces among them the most horrid wars; there, man like a savage and blood thirsty animal attacks man to devour him. The fear of the horrid calamities they are subject to, destroys in them the most tender of our natural feelings; pity and insensibility combine to put an end to the life of an old man who can no longer pursue his prey.

The law alone has done what natural feelings had no power to do. Law has created property by securing a certain and durable possession, and has encouraged men to labour beyond the necessities of the moment with the hope of reaping at some future time the benefit of their labour.

The law does not say to man, "work and I will reward thee;" but it says, "work and I will secure thee the fruits of thy labour." If industry creates, it is law which preserves; what in the first instance we owe to the former, we could not keep without the assistance of the latter.

To have a correct idea of the extension to be given to the principle of security, we must consider that man is not, like irrational animals, limited to the present in his sufferings or enjoyments. He suffers and enjoys by anticipation, and it would not be sufficient to secure him against a present loss; his possessions must be guaranteed to him against future losses. His security must be extended to the limits of the prospect which his imagination can embrace.

Expectation is a chain which unites our present to our future life,

The third, proposition can hardly be considered as doubtful. Suppose on the one hand a thousand cultivators in easy circumstances, and on the other a king or the richest prince in the world. It is probable that the latter may enjoy more happiness than any of the former, but no one could for a moment imagine his happiness to be as great as that of the whole of those cultivators, or, what comes to the same thing, a thousand times equal to that of each of them. The man born in riches does not know their value so well as he who has worked out his own fortune. It is the pleasure of acquisition rather than that of possession which is highly enjoyed.

The fourth and fifth propositions follow from those which precede them.

II. Let us pass to the second case and examine the effect of a portion of wealth when first falling into the hands of a person. Remark that expectation should not be taken into consideration. We must suppose this augmentation of fortune to come suddenly without having been expected.

A portion of wealth may be so much subdivided as to give no additional happiness to those who will receive one of the minute parts,* but generally, the more the distribution of a portion of wealth will let equality subsist between sharers of equal fortunes, the greater the total amount of happiness will be.

Between sharers of unequal fortunes, the more the distribution would tend to put them on an equality, the more happiness would result from it.

These propositions cannot be demonstrated, but it is hardly possible to reflect upon them and entertain any doubt as to their being generally true. Suppose two men have each twenty thousand Rupees. If a portion of wealth equal to ten thousand Rupees be divided equally between the two, it will increase by one *fifth* the fortune of each: if the whole were given to one man the first half would add

* This principle differently stated—a loss of wealth may be subdivided among many individuals so that it will cause hardly any pain to any of them,—has led to the establishment of Insurance Companies, and to the granting of indemnities by some princes to those of their subjects who had suffered from natural calamities or the miseries of war. The same principle might, with proper precautions, be applied to insurance against robbery and theft.

one *fifth* to his fortune, but to that fortune thus increased the second five thousand Rupees would only add one *sixth*. This alone would make it desirable that the second portion should go to the other man, instead of going to the one who has already received the first portion. But, besides, the larger the income of a man, and the more that income, or part of it, is applied to the satisfaction of fanciful wants which have less and less claim to be considered as *necessaries*.

On the other hand if we consider two parties, one of which has twenty thousand and the other a hundred thousand Rupees, it is obvious that, on both the principles stated above, the portion of wealth amounting to ten thousand Rupees, would produce more happiness if given to the poorer man than if divided equally between the two.

III. Let us pass to the third case, that is, examine the effect of a portion of wealth escaping from the hands of the parties concerned. Here again we must put expectation out of the question and suppose that loss to be sudden. Almost every loss in fact is sudden as men in general expect to keep what they have; this expectation is grounded on the ordinary course of things.

1st. The loss of a portion of wealth will produce a diminution of happiness greater or less according to the ratio of the loss to the remaining portion.*

2nd. Fortunes being equal, the greater the number of persons among whom a loss is distributed, the less is the total diminution of happiness.

3rd. Fortunes being unequal, the diminution of happiness which would result from the loss of a portion of wealth, would generally be less in proportion as that loss was distributed so as to bring those fortunes nearer to equality, supposing of course there was no objection on the score of a violation of security, that is, the loss not creating more alarm in one case than in the other.

The truth of the first proposition is evident. That of the second follows from the fact of the addition of each successive equal portion of wealth to a man's fortune adding less and less to his happiness.

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* This is one of the evils of gambling. I have 1,000£ and I stake 500; if I lose, one half of my fortune is gone; and if I win, only one third is added to it.

The third proposition rests on the comparative minor importance of a loss of fixed amount to a large income, and on the consideration that, between men of unequal fortunes, the excess of income of one over the others, is applied to the satisfaction of wants less and less pressing. Suppose two men, one of whom has one thousand Rupees income and the other only five hundred; a sudden loss of 400 Rupees income occurs to the richer of the two. I say that the loss of happiness is not so great as if each had lost 200 Rupees income, because in the first case, one man loses two *fifths* of his income and the latter nothing; in the latter instance, one man would still lose two *fifths* of his income while in addition to this the other man would lose one fifth too. Besides, the richer man will still be able to obtain all the comforts of the poorer and more, and if the loss had been equally divided, the poorer would have been deprived of comforts which approximate more to necessaries than those lost by the richer individual. If the income of the poorer was barely equal to his subsistence, the case would of course be much stronger, since any diminution of his income, instead of merely depriving him of comforts, would reduce him to starvation. If, on the other hand, the loss constituted a large portion of the richer man's fortune, and part of it might be divided among such a large number of men of moderate fortunes that the share borne by each would be very small, the above proposition might of course, require to be modified.

The above principles, which have nearly the evidence of Mathematical axioms, show what should be the tendency of a good system of legislation. So many natural causes tend to produce inequality in the enjoyments and the happiness of men, that a wise legislator should, at least, do nothing which may have the effect of adding to that influence, and of carrying that inequality to an extreme degree.

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Expectation is a chain which unites our present to our future life,

and even extends to the next generation. The sensibility of man is connected with all the links of this chain. The principle of security includes the maintenance of all these expectations; it prescribes that, as far as this may depend upon the laws, events shall be in accordance with the expectations which those laws have produced. When it is otherwise, when our hopes are not fulfilled, we experience the pain of disappointment.

CHAPTER VIII.

OF PROPERTY.

Let us carefully attend to our notion of property, and we shall see that property exists only through the laws.

Property is nothing but a ground of expectation; the expectation of obtaining certain advantages from the thing which we consider as ours in consequence of a certain relation we have to it. This relation is a mere conception of the mind. To have one thing in possession, to keep it, use it, sell it, are physical circumstances not sufficient to give the idea of property. A piece of cloth or land in America may be mine, while the coat I wear may not belong to me. The food I have eaten may be the property of another to whom I am accountable for its value.

The idea of property consists in the positive expectation, in the conviction that we may derive such and such advantages from the thing owned. This expectation, this conviction, are grounded on the law. I cannot reckon on the enjoyment of what I consider as my own, except so far as the law secures my possession; it is only in consequence of the law that I can enclose a piece of ground and plough it with the expectation of gathering the crop it may produce.

But it will be objected: what was the basis on which, in the first instance, the law established the right of property? Had not men in the primitive state a natural expectation of enjoying the property of certain things before the law had established such a right?

No doubt there must have been, and there will always be, circumstances in which man can without law secure to himself the enjoyment of certain things. But the number of such cases is very small. The wild man of the woods, who has concealed his prey, can hope to enjoy it so long as his hiding place is not discovered, or so long as he watches to protect it and is stronger than his rivals. But that is all. How miserable and precarious is this possession! Suppose the least agreement among wild men to respect each other's prey, and this is the introduction of a principle which cannot be considered as in its nature differing from a law.

As regards property, security consists in avoiding any sudden change, any disappointment. The legislator owes the greatest regard to the hopes he has created, and some evil is sure to result from those hopes being deceived.

But it may be asked: are not the laws of property good only for those who have property and oppressive to those who have nothing? Are not the poor more miserable in consequence of those laws than they would be without them.

Certainly not. Laws in creating property have created wealth; but poverty is not the work of the legislator, it is the primitive state of mankind; the man who lives from day to day, or the wild man, is precisely in the condition in which nature created him. The poor in a civilized society obtains nothing, it is true, except by hard labour, but in a state of nature what can he obtain otherwise? Is hunting unattended with fatigue, fishing without danger, war free from uncertainty? And if man seems to like this adventurous life, if he possesses an instinctive love for those dangers, if the wild man enjoys moments of idleness so dearly purchased, shall we thence infer that he is happier than our cultivators? No: the labour of the latter is more uniform but the reward is more certain, the life of women is easier, infancy and old age are better attended to, the population increases in a ratio a thousand times greater, and this alone is enough to show on what side is the superiority of happiness. Laws in creating wealth are beneficial even to those who remain in their natural poverty. They share more or less the advantages and benefits of a civilized society. Their industry and labour place them among the candidates for fortune, hope gives stimulus to their exertions.

It is the right of property which has conquered the natural aversion of man to labour. The universal wish is to obtain enjoyments quickly and without trouble. Such a wish might have dreadful consequences by arming those who have nothing against those who have something. The law which restrains this desire is the noblest triumph of humanity over itself.

CHAPTER IX.

EVILS RESULTING FROM VIOLATIONS OF PROPERTY.

We have seen already that subsistence depends on the laws which insure to the labourers the produce of their labour, but it is proper to enter into a more detailed analysis of the evils resulting from violations of property. Those evils may be reduced to four.

1. *The evil of non-possession.*—If the acquisition of a portion of wealth be good for any thing, it follows that its non-possession is an evil, although perhaps only a negative evil, that is, the absence of something good. The loss of a portion of good, even though we should never know of it, is still an evil. If you prevent by your calumnies my friend from disposing by a will in my favour of part of his property, it is an evil to me, although I had no expectation on the subject and may never hear of it. Your calumnies have deprived me of enjoyments which I should have otherwise obtained.

2. *Evil of losing.*—Whatever I possess or strongly expect to possess is fixed in my imagination as if it ought for ever to remain in my possession. All my hopes and the support of my style of living rest on this persuasion. Every part of my property may have for me a value of affection, as having been inherited from my ancestors, or being the reward of my labour, and the future support of my children. Property becomes as it were a part of ourselves which cannot be torn from us without acute pain.

3. *Fear of losing.*—To the regret of what we have lost is added the anxiety about losing what we still possess or even what we might acquire.

When insecurity increases to a certain degree, the fear of losing prevents men from enjoying what they possess. The wish to keep what they have, compels them to a watchful and troublesome caution which may however always be eluded. Treasures are buried and pleasures enjoyed only by stealth. Every care is taken to avoid giving notice to cupidity of the existence of any property which it might prey upon

4. *Extinction of industry.* If I despair to enjoy the produce of

my labour, I only trouble myself about my immediate wants; why should I labour for the future when this would be merely working for the benefit of my enemies? But, besides, to labour *will* is not enough, *means* are required. A single loss may ruin me, and may take it out of my power to exert my industry although the will to do so still remains.

It is clear from this analysis, that the two first evils do not extend beyond the person whose interest is concerned, whereas the two last spread in society to an indefinite extent. The violation of one man's property spreads alarm among all his neighbours.

The first loss thus occasioned discourages the most timid, another act of violence causes greater and more extensive alarm. The most prudent check their undertakings, and by degrees cease to produce what they fear they will not be allowed to keep or enjoy. As attacks on property and general oppression increase, some remove to more secure places; those who remain fall into a state of discouragement. Asia Minor, Greece, Egypt, the Coasts of Africa were in the flourishing times of the Roman Empire rich in trade, in agriculture and in population. What has become of their wealth under the absurd despotism of the Turkish Government? Huts are to be seen instead of palaces, thatched villages in the place of populous cities. That odious government never knew that a state cannot become rich unless it shows an inviolable respect to property. Its only principles of administration are to exhaust, and tyrannise over his subjects. And thus the finest countries on the surface of the earth have been devastated, ruined, almost turned into a desert since they came into the hands of those barbarous conquerors.

If one should trace the history of this contagion, it would be easy to see that it begins with the wealthy classes of society. The rich are the first sufferers, on them fall the first deprodations. Wealth disappears by degrees; as a mere subsistence itself is more or less dependent on abundance, every injury to the latter affects the former and soon, very soon, want, misery, desolation, replace abundance, comfort and prosperity.

What a contrast to this is the progress of security, and the prosperity which is certain to follow it. The interior of North America presents nothing but an awful solitude, impenetrable forests, stagnant waters, impure emanations, venomous reptiles. The savage tribes who

rove in the wilderness are only intent on pursuing their prey or slaughtering their enemies. There the most ferocious animals are far from being so dangerous to man as man himself. But on the limits of these desolate lands what a different sight! There one may, as it were, embrace at one view the two empires of Good and Evil. Little more than two centuries have elapsed since European colonies were established on that foreign shore, and forests have been replaced by luxuriant fields, marshes dried up, lands every where cultivated and covered with rich crops, herds of domestic animals, healthy and comfortable habitations. New born cities are built on regular plans and communicate with each other by spacious and well kept roads. Sea ports filled with ships receive all the productions of the earth. An immense people, living on the produce of its labour in peace and abundance, has succeeded a few hunting tribes always placed between war and famine. What has produced all these wonders? What has given man this command over lands formerly so poor and unproductive, now so much improved, so much embellished, so rich? The beneficent genius to which all these changes are due is Security.

CHAPTER X.

SECURITY—EQUALITY—THEIR OPPOSITION.

With reference to the great principle of security, what is the legislator to do as regards the mass of property in existence?

He must maintain the present distribution such as it is. This, under the name of *justice*, is with reason considered as a first duty. This general and simple rule applies to all states, and is adapted to the most contrary plans of legislation. There is nothing more different than the state of property in America, in England, in Hungary and in Russia; generally in the first of these countries the cultivator is at the same time the owner of his land, in the second he is farmer, in the third a serf, in the fourth a slave. However, the principle of security, superior as it is to all other considerations, requires all these distributions to be maintained, although so far from producing the same sum of happiness respectively But how could the distribution be altered without taking from some one what he has? How could you touch the property of one without injury to the security of the other? If to-day you replace the present distribution by an arbitrary one which you deem more beneficial to society in general, to-morrow you may have again to interfere, as inheritance, economy, extravagance will produce alterations in your arrangements. In the mean time what becomes of security, industry, happiness?

When security and equality are opposed to each other, there is no room for hesitation. Equality must yield. The former is matter of life and death; subsistence, abundance, and happiness, are dependent upon it. Equality produces only a certain portion of good, and besides will always be imperfect whatever may be done in its favour: if it could exist perfect for one day, it would be disturbed on the next To establish equality is not possible, all that may be done is to diminish inequality.

If violent causes, such as a political revolution or a foreign invasion, should produce a complete subversion of property, it would be no doubt a very great calamity, but the evil would only be temporary. As soon as some form of government had been re-established, or the enemy's

army had withdrawn, confidence would revive and industry again begin to produce. If on the contrary, the unsettling of property had been the result of a direct attempt forcibly to establish an equality of fortunes, the evil would be irreparable. What the legislator has done to-day, he may for what any body knows attempt again to-morrow. If it be necessary that equality should exist now, the same reason will require it to exist at any time. The accumulations of the industrious must be prevented or shared with the indolent. Thence no inducement to labour, no security, no industry, no abundance: society would return to the miserable state from which it has risen.

Small societies, under the influence of religious enthusiasm, have sometimes instituted among themselves as a fundamental rule, the community of goods. To the pleasing inducement of reward they have substituted the melancholy fear of punishment. Is it possible to think that happiness has gained by the change? Such societies have never lasted long. While the influence of the religious principle, under which they have been founded, continues strong, every one labours, but the moment it becomes weaker, the society divides itself into two classes. Some, degraded and abject, abandon themselves to all the vices of a miserable superstition; the others, indolent knaves, get themselves maintained in a holy state of idleness by the dupes who surround them This unjust and absurd system cannot be kept up without political and religious slavery, such as that under which the Helots suffered at Sparta and the Indians in the Jesuit's establishments of Paraguay. The word equality is then nothing but a pretence to cover the violence or fraud with which tyranny and indolence appropriate to themselves the produce of industry.

CHAPTER XI.

SECURITY, EQUALITY—MEANS OF RECONCILING THEM.

Is there an eternal opposition between security and equality?

To a certain degree they are opposed, but with a little care and patience they may gradually be reconciled.

The only mediator between contrary interests is *time*. Will you favour equality without any prejudice to security? Wait for the moment which puts an end to hopes and fears, the moment of death.

When the owner of property dies, the law may interfere in the distribution which is going to take place, either by restraining the faculty of disposing of property by will, to prevent too great an accumulation in the hands of one; or by establishing rules of succession favourable to equality. In these cases the law being only prospective, no expectations will be disappointed, because none will be entertained in opposition to it; the benefits of equality may thus be conferred on all without disappointing the hopes of any.

When desirous of putting an end to any kind of civil inequality, such for instance as slavery, we should pay the same attention to the rights of property, and endeavour to attain the subordinate without sacrificing the principal object of the law. Those to whom you will thus gradually have given their freedom, will be better qualified to behave themselves as freemen, than if suddenly introduced into a new system of social life by a violation of the laws of property.

In a nation, the agriculture, manufacture and trade of which are in a prosperous state, there is a constant progress towards equality. If laws do not interfere to prevent it, large estates are subdivided, riches acquired by industry, and a greater number of men enjoy the advantages of a moderate fortune. This is the natural result of the opposite habits adopted by the man born in opulence or by one who has risen from poverty. The former, vain and extravagant, wants enjoyment without labour; the latter, accustomed to obscurity and privation, finds a pleasure in industry and economy. And thus security, in keeping its rank as supreme principle, indirectly leads to equality, whereas the latter taken as the foundation of the social order would destroy security and perish.

CHAPTER XII.

SACRIFICE OF SECURITY TO ITSELF AND OF A PORTION OF PROPERTY FOR THE PROTECTION OF THE REMAINDER.

To labour and to protect the labourers, are two different operations at times incompatible. It is accordingly necessary, that those who produce wealth, should give some part of it for the support of those whose duty it is to protect the state. Wealth can be defended only at its own cost.

Society attacked by enemies, either foreign or domestic, cannot be protected except at the expense of the security, not only of the enemy, but of those whom it is necessary to protect.

Here is a list of cases where the sacrifice of some portion of security or property must be made for self protection.

1st. Wants of the state against external enemies.

2nd. Wants of the state against internal enemies.

3rd. Wants of the state to diminish the evil of physical calamities.

4th. Fines payable by offenders as a penalty or as damages to the offended party.

5th. Taxes on the property of individuals for the necessary support of a judicial establishment.

6th. Limitation of the rights of property which must not be used so as to injure others.

In all these cases, the necessity of the sacrifice is too evident to stand in want of any proof. It must besides be remarked, that the same reserves apply to other branches of security. For instance, personal security and honour can only be protected by penal laws, and penal laws act only on persons and honour.

CHAPTER XIII.

OF THE SUPPORT OF THE POOR, OF THE STATE RELIGION, AND OF ARTS AND SCIENCES.

Are the poor, the state religion, arts and sciences to be supported by compulsory taxes?

SECTION I.

Of Indigence.

In the highest degree of social prosperity the great mass of the people does not cease to be dependent entirely on its daily labour, and is always liable to be reduced to indigence by accidents, revolutions of commerce, natural calamities, and particularly disease. Infancy is not strong enough to support itself, old age has ceased to be so. If natural instincts, humanity, and shame, concur with laws in insuring to infants and old people the attention and care of their family, this protection is, however, but a precarious one; those who afford it, may at any time be themselves reduced to want. A numerous family, supported in easy circumstances by the united labour of the father and mother, may lose half its resources by the death of either.

Old age is more than infancy exposed to neglect. Gratitude towards parents has not the same power as the instinctive love for children. Hope is connected with the weak beings who begin life, but not with those who are on the point of leaving it.

This view of society is of all the most melancholy. Imagine the long string of evils which all tend to indigence and consequently to death in the most repulsive shape. This is the abyss into which every person is apt to fall and sometimes the most active, the most virtuous, are seen to be precipitated into it.

To obviate those evils, there are two means only independent of laws. *Economy* and *Private Charity*.

If these two resources could always be sufficient, it would be far from desirable for the law to interfere for the support of the poor. The law which offers to indigence a relief at the expense of industry, is, as

it were, a law against industry itself or at least against economy. The inducement to labour and economy is present want and fear of future want: the law which would remove this want and this fear, would be an encouragement to indolence and dissipation. This is one of the evil consequences of indiscriminate charity.

The two resources of economy and private charity, however, are sometimes insufficient, as very little attention will show.

How many men, for instance, have been brought into the world under circumstances which render it difficult for them to gain even a mere subsistence! How then can they afford to save? How many unforeseen accidents against which it was not in their power to provide? Must those men be left to perish from want? If a feeling of benevolence should not be sufficient to induce us to afford them some relief, is it not to be feared that they will be driven to despair and no longer respect laws which show no regard to them?

As for trusting to private charity, are there not strong objections to such a course? It is so uncertain, assistance thus given is so imperfectly distributed, the burden falls so unequally on those who are able to give. In many cases it will be altogether wanting or insufficient, whilst in others perhaps it will exceed what is strictly necessary. Thence misery and death or some encouragement to idleness and extravagance. In the distribution of alms, it is not true and modest poverty which obtains the best share. The support due to industry in misfortune is often given to the idle, whom no feelings of shame restrain from urging their claims with importunity. Besides, the most humane, the most virtuous members of society would thus bear the whole burden of a tax which the most selfish would escape. Such an arrangement would be a favour to selfishness at the expense of humanity.

From the above it will appear, that it is desirable the legislator should establish a regular contribution to supply the wants of the poor in extreme cases. The greatest caution is of course necessary to prevent this from degenerating into an encouragement to idleness and improvidence. The assistance thus given, should never exceed what is strictly necessary to support life; any thing beyond that must be left to private charity.

SECTION II.

Of the expenses of a religious establishment.

If the ministers of religion be considered as entrusted with the maintenance of one of the moral sanctions, the expenses necessary for their support must be held like those of police and justice, one of the elements of internal security. They form a body of inspectors and moral teachers, who have no actual power against crimes, but whose occupation it is to combat vices from which crimes proceed, and to render the interference of legal authority less necessary and less frequent, by keeping alive a spirit of morality and subordination.

If however there were in the country several distinct religions, and no previous establishment required special consideration, it would be more conformable to liberty and equality to allow each sect to provide for the support of its peculiar form of worship.

SECTION III.

Of the support of the Arts and Sciences.

Should the legislator provide for the encouragement of Arts and Sciences?

I do not allude here to Arts and Sciences, the utility of which is obvious, but is any public money to be given for the encouragement of architecture, painting, sculpture, poetry, public amusements, &c.?

The question is a difficult one, but some reasons appear in favour of an affirmative reply.

1. The expense incurred for such objects as the above, is generally very trifling comparatively to necessary state expenses.

2. It may have the effect of softening the manners of the people, bringing into exercise the disinterested faculties, attracting foreigners and thus tending to diminish the influence of national prejudices by furnishing opportunities to compare opinions and customs adopted under different circumstances in countries remote from each other.

After all, the object in question might well be left to be provided for by private and self imposed contributions; at least the legislator must take care to provide for every thing essential before he thinks of this. It will be time enough to take measures for the support of the

drama, painting and sculpture, when public security has been attended to, when individuals have been compensated for losses suffered from wars or other public calamities, and when the subsistence of the poor has been secured.

CHAPTER XIV.

INSTANCES OF SOME VIOLATIONS OF SECURITY AND PROPERTY.

Under this head may be included, 1st. All disproportionate taxes which fall lightly on the rich and heavily on the poor. The evil is increased by the feeling of injustice which the poor cannot fail to experience. The impressment of labourers is one of the greatest violations of equality and justice, as the burden falls only on those who have no other income but that which they derive from their labour. Such are taxes on the freedom of industry and commerce, the amount of which, as regards the people, is not to be estimated merely from what is paid, but from what, if it had not been for these restrictions, would have been produced and gained by the people. Such are also taxes on legal proceedings, which are in fact a refusal of legal protection to those who cannot afford to pay them, and thus hold out a prospect of impunity to offenders.

2d. *Fraudulent alteration of the proportion of precious metals in coins.* If a government should coin rupees or dollars which would contain only one half of the quantity of silver usually contained in that kind of coin, and should pay its creditors with that depreciated currency, it is clear that this would be equivalent to a national bankruptcy, as the creditors would thus be defrauded of about one half of the debt due to them.

3d. *Forced reduction of the rate of interest.* To attempt by enacting a law to decrease the rate of interest, is to interfere between the debtor and creditor to the prejudice of both. If a capitalist does not consider the legal interest sufficient to repay him for the risk and trouble of lending his money, he will either not lend it at all, or by some secret arrangement with the borrower will do so at a higher rate than the legal one, and that rate will be higher than it would have been had the law in question not been in existence, since it must repay him not only for the use of his money and the risk of losing it, but also for the risk of detection in the arrangement made to evade the law.

4th. *General confiscations.* These are confiscations of the property of a whole body of men on the plea that they belong to a certain political party, or to a certain religious sect; or that they, or their ancestors, did not come honestly by that property. To proceed in this way is to suppose crime instead of proving it. By means of such a logic it is impossible to be rich and free from suspicion. It can never be just to inflict such a severe penalty as confiscation on a whole body of men, without detailed inquiry and without proof. To confiscate the property of a whole body of opulent men, under the pretence that some of their ancestors obtained their wealth by unfair means, is to destroy a city because you suspect that there are some thieves in it.

5th. *Suppression of pensions or salaries without indemnity to those who were in receipt of them.* This violation of security, instead of being blamed as an injustice, is sometimes praised as an act of good administration and economy, but the public good demands the abolition of sinecures and not the ruin of individuals. The only way of reconciling these apparently contradictory interests, is to abolish those sinecures, not from the present moment but from the death of those who hold them. The immediate suppression of those places would be the ruin of the few for a very inconsiderable benefit to the many. It is neither generous nor just to act on such a principle. It is not by causing the misfortune of individuals that governments can procure the happiness of nations.

CHAPTER XV.

OF COMPULSORY EXCHANGES.

ASTYAGES in Xenophon asks Cyrus an account of his last lesson; the latter says: "In our school a tall boy had a coat too tight for him, he gave it to a smaller boy and took the latter's coat in exchange which was larger than his own. The smaller boy objecting, our preceptor appointed me to decide the case, and I decided that matters should remain as they were, both boys being the better for the exchange; but he told me I was wrong in confining my views only to propriety and disregarding justice, according to which no one should be forcibly deprived of what belongs to him."

At first it seems that a compulsory exchange is no violation of security when an equal value is received, but this is not correct. The person whom you suppose to have had a fair return for his property is really a loser. Every thing may have a different value for different persons according to circumstances; every one likes to remain in possession of all the favourable chances which may augment the value of some part of his property. If an individual does not accept the exchange you propose to him, it is a fair inference that he does not consider the value he is to receive as a proper equivalent for what he is to give.

But it is objected, perhaps, that the value offered is greatly superior to what the proprietor could under ordinary circumstances expect to receive for his property, that he knows the intended purchaser is greatly in want of it, and he wishes to take an undue advantage of that circumstance.

Here is a principle which may obviate this difficulty. Distinguish things into two classes, one having nothing but a material value, and the other having an extra value derived from association or affection. Common houses, a field cultivated in the usual manner, a crop of rice or wheat, the ordinary productions of manufactures, appear to belong to the first class. In the second may be included a library, pictures, statues, collections of natural history. In the latter case the exchange should never be compulsory; it may be so with respect to the

property of the first class but only in cases of necessity, and particular regard should be paid to the feelings which may cause more than the usual value to be attached to such property by the owner, as, for instance, if he inherited it from his ancestors, or it was given to him by a friend. Under such circumstances, a higher price might be paid to him.

In the above I have alluded to exchanges alone, and not to gratuitous usurpations. You have a considerable farm to which you can go only by one road, which is along the bank of a river. The road is carried away and your neighbour obstinately refuses to allow you a passage on his land of comparatively trifling value. This may be a good reason for the law to interfere and compel him to allow you, for a reasonable price, the passage you require, but it would not be just to compel him to allow you that passage for nothing. Usurpation without a proper equivalent, even when intended for the benefit of the state, is purely and clearly an act of injustice and tyranny. To reconcile a compulsion of this nature to the principle of utility, the case must be one of necessity, and a fair value must be given in return for what is forcibly taken.

CHAPTER XVI.

POWER OF LAWS ON EXPECTATION.

The Legislator cannot command human feelings. but he may interpret them and frame his measures accordingly. The goodness of the laws depends on their acting in conformity to general expectation It is thus of the utmost importance to understand the principle which regulates this general expectation so as to act in concert with it. This is the end to be aimed at: what are the conditions necessary to attain it?

1. The first and the most difficult of these conditions is, that *the laws should be enacted before the expectation is formed.* If we could suppose a nation just brought into existence, the legislator, finding no preconceived expectations in opposition to his views, would have every possible advantage to frame his code for the happiness of the greatest number. But among all nations there are many expectations grounded on ancient laws and usages, which cannot be disregarded by the legislator, and compel him to adopt a system of conciliation and compromise, which greatly adds to the difficulty of his task.

Have you to enact a law which will disappoint the present expectations of any body? Let, if possible, that law begin to take effect at some remote period. The present generation will not be affected by the change; the generation now rising will be all prepared for it. You will not have injured actual interests, because time will permit arrangements to be made for a new order of things.

2. *The Laws should be fully known.* A law which should not be known could have no effect on expectation and could not prevent hopes to be conceived in opposition to it

This condition, it may perhaps be objected, does not depend on the nature but on the promulgation of the law. This however is an error. Some laws are more easily known than others. Such are those which rest on natural expectations. Those natural expectations may be the result of superstition, prejudice, or any other cause, but whatever this may be, a law contrary to them cannot easily be understood and is seldom at first well remembered. The natural disposition has taken hold of the understanding, and the new law standing alone unconnected with any previous feeling, has by itself a constant tendency to slip from the memory.

The natural expectation is always of course directed towards the laws most important to society, and a foreigner who should be guilty of an act of forgery, a robbery, or a murder, would not be admitted to plead his ignorance of the laws of the country, because he could not but know that acts so evidently hurtful to society, were in every country offences liable to punishment.

3. *The laws should be consistent with each other.*—This principle bears a close analogy to the preceding. When a certain legal provision has been enacted with regard to a principle generally admitted, every other provision of the same kind, which appears to follow from the same principle, will naturally be in conformity to general expectation. In all analogous cases the law is, as it were, known before hand. But on the contrary a law which has not this character of analogy, remains more or less unconnected in the mind, and the influence of the principle to which it is opposed is a force constantly tending to expel it from the memory.

That, on the death of a man, his property should descend to his nearest relatives, is a general rule which regulates all expectations accordingly. A law which would be a natural consequence of that rule would be intelligible to all and generally approved. But the further you remove from that principle in admitting exceptions, the more difficult it becomes to understand and remember them. The English Law of inheritance is a striking example of this. It is so intricate as to be hardly intelligible.

When new laws are opposed to a principle formerly admitted, the odium they provoke is in proportion to the hold of that principle on the mind, that is, to the feeling of disappointed expectation.

In Turkey, on the death of an officer of Government, the Sultan takes possession of his fortune to the prejudice of his children, who thus perhaps fall from a state of opulence into one of poverty. This law opposed to all natural expectations, is probably copied from the code of some other oriental government where it was less inconsistent and odious because the sovereign had none but eunuchs for his officers.*

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* This Turkish rule of inheritance is more likely to be the result of a known propensity, very generally indulged by Turkish Government officers, to plunder those who are placed under their authority, and may perhaps have been considered as a necessary check on their rapacity.

4. Laws cannot be really consistent unless *they are grounded on the principle of utility*. This is the common centre of all expectations However, a law in accordance with the principle of utility may be contrary to public opinion; but this cannot last long. It is only necessary to prove that it is agreeable to the principle in question, and men will become reconciled to it. The plan which is most favourable to the interests of the majority, cannot fail to command the greatest number of votes, and a useful innovation, at first received with distrust and apprehension, soon becomes so familiar that its origin is forgotten.

5. *The laws should be methodical.* A want of method in a Code of laws, adds to the difficulty of understanding and remembering them. The more intricate the law is, the more it is likely not to be known to the many, who either are altogether ignorant of its provisions or perhaps misunderstand them. It is necessary that both the style and the method should be as simple as possible, so that every law be intelligible to men of the most ordinary capacity. If the legislator expresses himself in terms not generally understood; if any of his laws, instead of being clear and precise in themselves, cannot be understood without the assistance of an interpreter and without reference to half a dozen previous statutes, how can men generally be expected to understand them? Thus the Code, instead of being as it should be a manual of education for the young, becomes a monopoly for a privileged class.

6. The laws should be *such as may be invariably carried into execution.*

Is there any apparent reason to suppose that a law may easily be evaded? An expectation of this kind is immediately formed. The law is thus useless. When for instance, it was enacted that no one should keep more than a certain sum of money in his house, every one must have perceived that the law could not possibly be enforced.

This principle may be brought forward in support of the domestic authority being placed in the hands of the husband. If it had been given to the wife, the physical power being on one side and the legal power on the other, the disagreement would have been endless. If the law had considered both parties as equal, this equality would have been little more than nominal, because in most instances when the will of one does not agree with that of the other, the stronger party must necessarily prevail.

This same principle will also be useful to solve problems which

have puzzled learned jurists. For instance: in what cases should *a thing found* be given up in full property to the person who finds it? The easier it is to appropriate that thing in spite of the laws, the more proper it will be not to enact a law in opposition to that expectation. Suppose I find a diamond: I immediately conceive the hope of keeping it. I am in possession, which in itself is a good title where no other is in existence; I took the diamond from the ground where it was unknown to every body; lastly, I can flatter myself I shall be able to keep it and dispose of it, not only without the assistance of the law, but in spite of the law itself, as I have only to wait quietly until I can find a purchaser who will not know how it came into my possession. The law which would give this diamond to any other person, would thus disappoint my expectation, and for the benefit of whom? Who, this diamond being of course supposed not already to belong to any one, who, I say, can have a better title to it than myself? To take it for the benefit of the state would be to deprive, for a most minute and little more than nominal advantage to the many, an individual of what natural circumstances have led him to consider as his property and a valuable addition to his fortune. The worst of this law is, that it would be harsh only to those who are scrupulously honest: others would easily evade its operation.

The case is very different, if the thing found be such as cannot be secured without the assistance of the law. If it be a ship which I have first seen wrecked on the coast, a mine or an island I have discovered, I cannot secretly keep possession of these, and consequently a previous law, occurring to my mind at the moment of discovery, might prevent at once my entertaining any expectation of appropriating the object of my discovery. The law which would refuse it to me being of easy execution, would have on my mind its full and complete effect. Accordingly if we advert only to the principle now under discussion, the legislator might allow or refuse to the discoverer any share in the property of the object he has discovered. But there is a special reason which should determine his conduct on the subject: it is that a reward to industry tends to increase the general wealth. If all the profit of a private discovery should be claimed by the government, the amount would be little, as few discoveries would be made by individuals.

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7. The seventh and last condition is, that the *laws such as they*

are, should be strictly executed. This depends partly on the laws and partly on the judges. If the laws be not in harmony with the present state of civilization of the people, the Courts gradually modify the ancient interpretations and cease to carry the law into execution, where it appears grossly at variance with the new principles and a more enlightened way of thinking. From this results an uncertainty in the administration of the law sure to weaken its power on expectation. When once the judge assumes the power of refusing to carry the law into effect according to its clear and express meaning, when he substitutes instead of this what he fancies would now be the intention of the legislator, security exists no longer. It is not the present results only of such a decision which must be considered. All usurpation of a power superior to law, though useful perhaps in its immediate results, must be matter of anxiety for the future. There are very narrow limits to the advantage which may be the consequence of this usurpation, but there is none to its possible evils.

When one conceives a system of laws based on philosophical principles, and compares it in imagination with existing institutions, the result is far from being favourable to the latter.

However, let us not utter exaggerated complaints against imperfect laws. Such as they are, their benefits are innumerable. Security, property, industry and abundance are due to them. Their good effects are universal and exist at all times; the evils they produce or do not prevent, are mere accidents. Their benefits, though real, are not always perceived; we enjoy those benefits without referring them to their cause, as if they were nothing but the ordinary course of nature, but we are quick in perceiving the evils and in describing them: they are usually magnified in appearance by enumerating at once what happened in an extensive country and in the course of several years. How many reasons to look up to the laws with respect and gratitude in spite of their imperfections!

BOOK SECOND.—TITLES TO PROPERTY.

CHAPTER I.

GENERAL TITLES TO PROPERTY.

Up to this we have considered only the reasons which should induce the legislator to acknowledge and support private property, now we must refer to details and investigate the principles which constitute the rights of this or that individual, to this or that property.

1. *Actual possession.* Actual possession is a title of property which may always be considered as good so long as there is no other to oppose to it. To take arbitrarily from the possessor and give what is thus taken to another, would be to produce a loss on one side and a gain on the other. But the value of the pleasure is not equal to the amount of the pain, and such an act of violence would create alarm among all proprietors. Thus actual possession is a title based on the good of the first and that of the second degree.

In acknowledging a right of property in the first occupant, the law 1st. secures him from disappointment, a pain which he would experience if deprived of what he was the first to possess; 2dly. it prevents disputes and quarrels which might take place between different claimants; 3dly. it creates enjoyments which would not otherwise be experienced by any body. The first occupant, fearful of losing the thing he had discovered, would not dare to enjoy it. 4thly. The advantages which are thus secured to him are a stimulus to the industry of others. 5thly. If every thing was not acknowledged as belonging in the first instance to the first occupant, it would be taken hold of by the strong; the weak would thus be in a continual state of oppression.

The title of first possession was the original foundation of all property.

2. *Ancient possession in good faith.* This, after a certain time fixed by the law, should prevail over all other titles. If you have allowed such a time to elapse without bringing your claims forward, it must be either because you did not know then of your own right, or did not intend to avail yourself of it. In either case, you have had no expectation, no desire, of enjoying the thing in question; whereas on my part there is expectation and wish of keeping what I have so long possessed. To deprive me of possession and make over the property to you, would create anxiety among all proprietors who know of no other title to their property but their possession and good faith. Thus the result of such a transfer would be an evil of the first and one of the second degree.

But what is the number of years which the law should fix upon as rendering possession in good faith a legitimate title to property against all others? It is not possible to determine any period which may not in some cases produce the pain of disappointed expectation among the interested parties themselves, but it will at all events prevent the evil of the second degree. The law warns me that if I neglect for six, for twelve, for thirty years, to bring forward my claims, my right will cease to exist. This threat, the results of which I anticipate, cannot trouble my security.

I have supposed that the possession was in good faith. If not so, to confirm it would not be to favour security but to reward crime. No length of possession known by the party to be fraudulent should be held sufficient to secure to him the price of his fraud. Why should he be permitted to look forward to a time when he will quietly enjoy the fruits of his crime under the protection of the laws he has violated?

As regards his heirs, a distinction must be made. Do they hold possession in good faith? In this case all the reasons urged above for confirming such a possession decide the case in their favour. Is their possession known to them as fraudulent? If so, they are the accomplices of their predecessor, and their fraud should not meet with impunity.

3. *Possession of the contents and produce of a piece of land.* By *contents* is meant whatever is below the surface as quarries and mines, by produce all that is the result of vegetation. All possible reasons

unite to give this extent to the right of property, security, subsistence, augmentation of general wealth, the advantage of peace.

4 *Possession of what lives on the land.* If this hare, these birds, have fed on the produce of my land, their existence would have been a loss to me if their possession did not secure me a compensation. If the law gave them to another, it would be a pure loss to me and a pure gain to the other party; an arrangement as contrary to equity as to security. It would then be my interest to destroy the whole breed to the prejudice of the general wealth.

If chance has thrown on a piece of land any thing not yet appropriated, or the proprietor of which is not known, as a whale thrown on shore in a storm, a tree or some part of a wreck, these things should belong to the proprietor of the land. The reason of this preference is, that he is so situated that he may take possession without inflicting any loss on any body; that he could hardly be deprived of that property without experiencing the pain of disappointment; and that perhaps no one else could take possession of the thing in question without trespassing on his land.

5. *Possession of lands along a new accretion.* A river has abandoned some lands over which it used to flow. To whom should the property of these lands be given? There are many reasons to give them to the proprietors of the neighbouring lands. 1st. They alone perhaps can occupy them without trespassing on another person's ground. 2d. They alone can have entertained some expectation on the subject. 3d. The chance of gaining by a change of direction in the river is but a compensation for the chance of losing by the same cause. 4th. The property of the acquired lands will stimulate industry to undertake the labour by which such acquisitions may be made.

Many details relative to this subject need not have place here. If the accretion be surrounded by the lands of several proprietors, in what proportion should it be divided among them? Some principles should be adopted beforehand, so that when the event happens, the expectations of each may quietly conform themselves to the rule laid down by the legislator.

6. *Amelioration of one's property.* If I have applied my labour to the improvement of things already mine, my title to them becomes stronger. I have sown grain in my land, bred this cattle, cut and

worked this timber. If I should have felt pain in being deprived of these things in the first instance, what would it not be now that they are so much more valuable?

7. *Erroneous possession in good faith with amelioration.* But if my labour has been applied to a thing which was the property of another, though I believed it to be mine, if for instance I have made up some cloth with cotton now proved to be yours, which of us is to have it?

Here a distinction is necessary. If it be in good faith I have treated the thing in question as if it had been mine, it would not be just to deprive me of it altogether now that its value has been increased. On the other hand, the rightful owner must get his right or some compensation for it. The principle of utility, attentive to reduce to the least possible amount an unavoidable evil, weighs both claims, looks for the means of reconciling them and prescribes compensations. It will examine which has the greater value, the original thing or the addition made to it by labour; and it will decree the property of the thing in question to the claimant who would be the greater loser by being deprived of it, but on condition of his making a sufficient compensation to the other party.

English jurists have cut the gordian knot. They have not taken the trouble to examine good faith or bad faith, greater value original or added, greater expectation of keeping possession, greater loss by being deprived of the property in dispute. They have decided that moveable property should be given up to the actual possessor on the condition of indemnifying the proprietor.

8. *Working of mines in other man's land.* There is a rich mine in your land, but whether you want knowledge or means, or confidence in the eventual result, you will not venture to work it, and the mine remains unopened. If another person be willing to work it at his own risk, should the law authorize him to do so? In your hand these buried treasures will do no good to any one; brought into circulation they would stimulate industry and benefit society. What injury can this do to you? The surface, the only thing productive to you remains as it was. Besides, the law attentive to all interests, insures you some part of the produce of the mine, because although it was unproductive in your hands, you might still have entertained an expectation of deriving advantage from it at some

future day, and it is just to compensate you for the loss of this chance.

Such is the English law. It allows, on certain conditions, any one to undertake the working of a mine discovered in the land of another.

9. *Liberty of fishing in great waters.* Great lakes, great rivers, large bays, and above all the ocean, are considered as belonging to nobody or rather as belonging to all.

There can be no reason to limit the right of fishing in the ocean. The abundance of most kinds of fish appears inexhaustible. The richness, the prodigality of nature in this respect are inconceivable. The number of eggs of a single cod is supposed to be more than ten millions. Where there can be no reason of jealousy, no fear of seeing a source of wealth exhausted by the number of concurrents, it is advisable to leave to every one the right of first occupant and to encourage a kind of labour which tends to augment general abundance.

As for the fish of small rivers, lakes, or gulfs, the laws take for their conservation efficient and necessary precautions.

10. *Liberty of hunting over unappropriated lands.* In vast countries with few inhabitants, the right of hunting may be exercised without limit. There man is but in this the rival of carnivorous animals, and hunting adds to the means of subsistence without injury to any individual.

But in civilized societies, where agriculture has made great progress, where almost all the lands have been appropriated, there are many reasons for not allowing the exercise of such a right without restriction.

1st. Where the population is numerous, the destruction of wild animals might go on quicker than their reproduction, and would thus in the end altogether deprive society of one source of wealth.

2dly. Hunting, without being more productive than other labour, has unfortunately more attractions. These will tend to increase the number of competitors, they will reduce the price of game to the lowest point, and generally this class of labourers will remain poor.

3dly. As there are peculiar seasons for hunting, the hunter will not easily in the season of rest pass from an active to a sedentary life. His means of subsistence will then fail him. Accustomed to live in a state of hope and excitement, the prospect of a small fixed salary is not likely to induce him to labour. He is thus probably, by idleness and misery, led into the commission of crime.

one of them or to the public. All the causes of invalidity in exchanges may be included under the following nine classes:

1. Undue Reticence.
2. Fraud.
3. Undue Coercion.
4. Subornation.
5. Erroneous supposition of legal obligation.
6. Erroneous supposition of Value.
7. Interdiction, Infancy, Madness.
8. Injury to the community.
9. Want of right on the part of the seller.

1. *Undue Reticence.* If the thing purchased should happen to be inferior to the value which the purchaser supposed it to have, he naturally experiences a feeling of disappointment If that value be inferior to that which he has given in exchange, instead of making a profitable bargain he suffers a loss. It is true that the other party has realized a gain corresponding to that loss. But we have seen that the evil of loss was more than equivalent to the benefit of gain. I have paid five hundred Rupees for a horse which would be worth that sum if he were in good health, but he is broken winded and not worth more than fifty Rupees. I thus lose, and the vender gains four hundred and fifty Rupees. Let the interests of the parties be compared, and it will appear that on the whole, the bargain is not advantageous, but the reverse.

However, if at the time of the bargain, the former did not know the defect of his property, why should the transaction be null and void? The loss must fall on some body, why should it fall upon him rather than on the other party? Suppose even he knew of the defect, was it his business to mention it to the purchaser without being questioned by the latter on the subject?

The following two questions should always be attended to when examining a case of *undue reticence.* Did the vender know of the existence of the defect? Is the defect one which he ought to have mentioned? The solution of these questions requires too many details for this place, particularly as it cannot be a general one but must be modified according to the different kinds of things exchanged *

* It is dangerous to interfere with conventions solely on the ground here alluded to. In general, when the defect was not known to the vender, or,

2. *Fraud.* This case is simpler than the preceding one. A fraudulent bargain should never be allowed if it can be prevented. This is a kind of theft. You asked the vender if the horse was broken winded, he replied negatively although he knew the reverse. To sanction such a bargain would be an encouragement to fraud.

3. *Coercion.* The vender of the horse has compelled you by violence or threat to pay five hundred Rupees for a horse which was only worth fifty. It is clear that the law cannot sanction such a transaction.

4. *Subornation* is the price of a service consisting in the commission of a crime, as for instance, paying a witness to induce him to give false evidence. In these and the two preceding cases the law does not only declare the contract invalid, but places it among punishable offences.

5 *Erroneous supposition of legal obligation.* You have delivered over your horse to a person to whom you erroneously supposed your agent to have sold it, or whom you were led to believe was authorized by Government to take it at a certain valuation for the service of the state; in a word, you supposed yourself under a legal obligation which did not exist. If such a sale was confirmed after the error is discovered, it would afford an undue advantage to the buyer at the expense of the seller. Such cases appear also to come under the description of *fraud or coercion.*

6. *Erroneous supposition of value.* If in selling a thing I am ignorant of a circumstance which tends to augment its value, on discovering my mistake I shall experience a feeling of regret at the loss I have thus incurred. But is this a proper cause of invalidity? If such causes were admitted to annul a contract, it is to be apprehended that exchanges would be greatly discouraged. What becomes of the security of the purchaser if the former proprietor can annul the bar-

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when knowing it, he merely abstained from mentioning it, without saying or doing any thing to deceive the purchaser, the safest plan is perhaps to hold the sale good. However, if the loss thus occasioned to one of the parties, be very great and easily ascertainable, say more than one half of the value of the thing, that loss might be divided between the parties where the defect of the thing sold was not known to either party, or the sale cancelled, if the vender knew the defect and did not mention it Vide further *erroneous supposition of value.*

gain by merely saying he did not know the value of his own property? But again, it would be very hard on a man, who by mistake sold a diamond believing it to be merely a piece of glass, not to allow him to have the bargain cancelled. To keep the balance equal between the parties, regard must be paid to circumstances. It is necessary to examine whether the ignorance of the vender was owing to negligence; and even in cancelling the sale, if it be necessary to do so, due provision should be made for the security of the buyer.*

7. *Interdiction, Infancy, Madness.* In these cases the evil of the contracts is foreseen and the legislator prohibits them before hand. In some countries men are *interdicted* on account of their known extravagance, that is, all future bargains made with them are declared null and void. Such an interdiction exists every where for infancy and madness. In these three cases interdiction extends only to transactions of some importance.

8. *Injury to the community.* The law invalidates also transactions which may have some dangerous consequences.

I have a property situated on the frontier; if purchased by the neighbouring state, it might become a place of intrigues and hostile preparations dangerous to the country. The law may foresee this evil and before hand refuse its sanction to such sales.†

The prohibitions existing in some countries against the sale of poisons and that of murderous weapons belong to this head.

Here we must remark that no bargain is valid or null in itself. It is law (Civil or Moral) which annuls or confirms it, and there must be some reasons for doing either the one or the other.

SECTION III.

Of obstacles to the alienation of immoveable property.

Besides the general reasons, there is a special one in favour of the power of alienation as regards immoveable property.

The man who tries to dispose of his land, clearly shows that it does

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* Vide note above relating to "*undue reticence.*"

† Many states have done this without thinking of it. They have prohibited the purchase of immoveable property by foreigners. But this is carrying the law much beyond the point of expediency.

not suit him to keep it; he cannot or will not do any thing to improve it; frequently even he will injure its future value to obtain a present advantage. On the contrary, the man who purchases it, can have no disposition to injure its value and probably intends to improve it. Thus, such a transaction not only suits the two parties directly concerned, but has an evident tendency to add to the wealth of the country. If, instead of that, the law prohibits the sale, a man who has no inclination for agriculture is compelled to remain a landed proprietor, while he who would be an agriculturist must employ his capital in some branch of industry less suited to his taste and abilities.

The obstacles to the alienation of land which result from a law of entail, although opposed to sound notions of political economy, exist in many countries. Three causes contribute to maintain them

The first is a wish to prevent extravagance. But to obviate this evil it is not necessary to prohibit the sale of lands, it would be sufficient to protect their value by not leaving it at the disposal of the party concerned. In short the special remedy to this evil is interdiction.

The second reason is family pride, added to that pleasing illusion which represents to our imagination the successive existence of our descendants as a prolongation of our own. To leave them the same wealth in another form is not enough to satisfy the feeling in question: that wealth might be dissipated; we must insure to them the same lands, the same houses. This kind of continued possession looks like a continued enjoyment, and men indulge such an idle fancy at the expense of the best interests of society.

The third cause is the love of power, the wish of exercising it after one's death. The preceding motive supposed a posterity, but this does not. To this cause may be referred all endowments, those which have utility for their object as well as those which originated in the most fanciful notions.

The advantage of confirming endowments depends entirely on their nature. A singularity which deserves to be remarked is, that in general these foundations, which are a kind of laws enacted by private individuals, have met with more respect than public laws enacted by the sovereign himself The attempt of a legislator to bind his successor has always been considered as vain and useless. The most obscure individuals have assumed that privilege, and it has been religiously respected.

CHAPTER III.

ANOTHER MEANS OF ACQUIRING PROPERTY.

Succession.

After the death of an individual, how should his property be disposed of?

The legislator must have three objects in view in the law of succession. 1st. To provide for the subsistence of the coming generation. 2d. To prevent disappointment. 3d. To legislate so that his code of laws may have a tendency to produce the equalisation of fortunes.

Man is not a solitary being; with few exceptions every man has a circle, more or less extended, of relations and connexions who share with him the enjoyment of his fortune. That fortune is frequently for many of them the only means of subsistence. To save them from the misery to which they would be exposed on the death of their protector, if that event deprived them of all share in his fortune, it is necessary to ascertain those who before depended upon it.

But these are facts which it would be impossible to ascertain by direct proofs without getting into endless difficulties and law suits; it thus becomes necessary to be contented with general presumptions. The usual share of each person in the property of the deceased may be inferred from the degree of affection which must have existed between them, and again this affection must be presumed to have been regulated according to the degree of their relationship.

If the degrees of relationship were the only consideration to be attended to, the law of succession would be easy. In the *first degree* a man has with reference to himself all those connected with him without an intermediate person, his wife, his father and mother, and his children. In the *second*, all those whose connexion depends upon the intervention of one person or one married pair, grand-fathers and grand-mothers, grand-sons and grand-daughters, brothers and sisters. In the *third* come those whose connexion implies three intermediate steps, as great grand-fathers and great grand-mothers, great grand-sons and great grand-daughters, uncles, aunts, nephews and nieces.

But this arrangement, although as perfect as possible with regard to simplicity, would not altogether answer the political and moral end in view. It would not either correspond with the presumed degree of affection, and it would not obtain the chief object, which is to provide for the wants of the infant generation. Let us then adopt another arrangement entirely grounded on utility. This will be to *give to the descending line the preference over the ascending line.* It will happen of course that the presumption of affection and want upon which this rule is based will sometimes be in fault, and consequently the rules will not always answer their proposed object. But the right of making a will offers, as we shall see, an efficient remedy to the imperfection of the general law, and this is the chief reason to maintain the right in question.

But how are these general principles to be applied in practice? The draft of a law on the subject will obviate many discussions.

Section 1.—"No distinction between the sexes; what is said with reference to one extends to both. The share of one shall be equal to that of the other."

Reason. Benefit of equality. If any difference were made it should be in favour of the weaker party, that is, in favour of women who have more wants and fewer means of providing for them by labour and industry.

Section 2.—"After the death of the husband the widow shall keep one half of the common property, unless it has been otherwise provided for in the marriage contract."

Section 3.—"The other half shall be divided equally between the children."

Reasons. 1st. Equality of affection on the part of the father. 2d. Equal previous enjoyment of his fortune by all his children. 3d. Equality of wants. The differences of age, constitution, talent, strength, &c. may produce some differences in wants, but the law cannot appreciate such details. The father may provide for them in his will.

Where the share of each child is equal, the fortune of the wife will in general be about equal to that of the husband, and this being the common case must be presumed always so, unless the contrary appears from the marriage contract and some other arrangement has been there provided for.

Section 4.—"If a child dies before his father and leaves some children behind him, his share shall be distributed among them equally, and this rule shall hold in any degree of the descending line."

This is the division per families instead of the division per heads. That the share of the first-born should be diminished by the birth of each new brother or sister, is not a circumstance calculated to make him experience any disappointment. Generally he is too young to have before entertained any expectations on the subject; besides, such subsequent births are natural and probable events upon which his expectations must have been regulated. But when one of the brothers or sisters marries, the father and mother are in general no longer of age to have any more children, so the diminution of each child's share by a subsequent birth may be considered as at an end. If on the contrary, the birth of each grand-son and grand-daughter occasioned a diminution of share equal to the birth of each son and daughter, that diminution would be endless. So long as the parents lived, the sons and daughters would never know what may be the amount of their respective shares, and how they are accordingly to regulate their plan of life.

Besides, grand-children have in the fortune of their mother a resource in which their uncles and aunts have no share. Their subsistence and their expectations must have depended on that fortune, or on the industry of their father and the assistance he received from their grand-father. Such assistance cannot in general have exceeded one child's share.

Section 5.—"If a man dies without descendants, his father and mother shall inherit his fortune."

Why should the descendants have the preference to the exclusion of the ascendants? Because their wants are greater Our children cannot exist without us or some body who takes our place, but it is probable that our father, mother, &c. may exist without us since they existed before we were born. Besides a superiority of affection also may be presumed, and any other arrangement would not in general agree with the wishes of a parent. We love those who depend upon us better than those upon whom we are or have been dependent.

Why should the father and mother inherit rather than the brother and sister? 1°. Because the relation being more immediate the affection may be supposed greater. 2°. It is a compensation for the

trouble and expense of education. My relation to my brother is through our common parents; it is not certain that I am under any obligation to him, and I owe them every thing.

Section 6.—"If the father or mother be dead, one half of the deceased son's property shall go to the surviving parent, and the other half to the descendants of the parent deceased, in the same way as his own fortune."

However, in poor families, who have no other property than their house furniture, it would be better that the whole should go to the survivor. A division would ruin him.

Section 7.—"If there be no descendants of the deceased parent, the whole of the deceased son's property shall go to the surviving parent."

Section 8.—"If both parents be dead, the deceased son's property shall be divided in the same way as their own among their descendants."

Section 9.—"But provided however that where there are relatives of the half blood and of the whole blood, each relative of the half blood shall only have half the share of a relative of the whole blood in the same degree."

Section 10.—"In default of relatives in the above mentioned degrees, the property of the deceased shall escheat to the state."

Section 11.—"Provided, however, that the income derived from that property shall be distributed as annuities, between all the surviving ancestors in equal portions."

This part of the law might be modified, but there does not appear to be any valid objection to it as a means of Government revenue. The collateral relatives cannot have entertained any great expectation, and regulated their plan of life with reference to such a remote chance. An uncle cannot in general attach much importance to the right of inheriting from his nephew, and the proposed law would easily prevent his ever entertaining any expectation on the subject. However, in case of the death of the parents, an uncle may have taken their place and been a father to their children. If the law be considered too harsh, it might be modified to meet this case.*

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* This law might easily be modified, so as to suit more the general feelings on the subject, by allowing the inheritance to pass to the descendants of the grand-father where there are none of the father.

Section 12.—"To carry the division between several heirs into effect, the property shall be sold by auction unless they agree among themselves to any other arrangement."

This is the only way to prevent as much as possible the evils of joint undivided property which will shortly be explained. Those parts of the inheritance which may have a value of affection, will realize their price by the competition of the heirs to purchase them.

Section 13.—"Pending the sale and division, every thing shall be entrusted to the charge of the oldest male heir, supposing him to be of legal age; provided, however, that in special cases where bad management is to be apprehended, the Judge may order a different arrangement."

Women in general are not so fit for business as men. It may of course be otherwise in some particular cases, where the unanimous vote of the relatives might be allowed to select a female heir as temporary manager of the estate.

Section 14.—"Should the oldest male heir not be of legal age, the management shall be given to his guardian."

Section 15.—"The inheritance which may escheat to the state for want of natural heirs shall be put up to auction and sold."

The government is incapable of managing an estate to the best advantage. Its agents are too expensive, and their management is not so efficient as that of a private individual who is himself interested in the value of the property.

The above draft of a statute appears simple, concise and easily intelligible. It leaves little room for fraud and chicanery, and as it is besides grounded on the affections of the human heart, it is probably well calculated to obtain the approbation of those who judge from sympathy, as well as of those who can appreciate reasons.

CHAPTER IV.

OF WILLS.

The law can only provide for ordinary and not for special cases. The proprietor who knows the circumstances in which those who depend on his support will find themselves after his death, must correct the imperfections of the law of inheritance where its provisions would not perhaps answer the object of the legislator. The power of making a will is an instrument put into the hands of individuals for the above purpose.

The power alluded to, however, may also be considered in another light. It is an authority entrusted to individuals to encourage virtue and repress vice in the interior of families. This authority may, it is true, be used for the contrary purpose, but fortunately this is the exception, not the rule. The interest of each member of the family is, that the conduct of every other be in conformity with virtue, that is, general utility. Even vicious parents sometimes show themselves anxious for the honesty and good reputation of their children. A man little scrupulous in his actions would perhaps be very sorry that his secret conduct should be fully known in his family; there he is the unceasing apostle of virtue which he disregards for himself, but the importance of which he well appreciates in those who serve him.

In addition to the above, the power of making a will is beneficial also in another respect. It is the means of commanding as master, if not for the advantage of those who obey, at least for that of him who commands. The influence of the present generation thus extends over the future, and the wealth of each individual is thereby, as it were, doubled. By means of a gift to be received after his death, a man may procure some present benefit otherwise unobtainable by him. Although it is hard to think that such precautions are necessary to secure the attentions and care of children, if we reflect on the infirmities of old age, it will be easily perceived how desirable it is that some advantage should compensate them. In the rapid decline of life we must leave to it such a support; it is as well that interest should thus be connected with duty.

Ingratitude of children and contempt for old age are not vices common in civilized societies, but we must recollect that the power of making a will exists more or less every where. Are those vices more frequent where that power is more limited? To decide that question it would be necessary to examine what takes place in poor families where there is little to dispose of by will; but even such an inquiry would be insufficient for the purpose, because the influence of the power alluded to increases the paternal authority, and tends to spread generally a sentiment of filial submission and respect. A father who has nothing to leave unconsciously enjoys the advantages of that feeling.

However, in giving authority to the father, care should be taken that he does not become a tyrant. If his children may not behave well to him, it is also possible that he should not behave well to them, and if he has the power of fining them, it does not follow that he should have that of reducing them to starvation. So the institution of what in France is called a *legitime*, appears to be a suitable medium between domestic anarchy and tyranny. Fathers might be permitted to deprive their children even of that *legitime* for special reasons, proved in a court of justice.

But there is another question Is a proprietor, who has no natural heirs, at liberty to leave his fortune to whom he likes? In this case the state revenue from this source will be reduced almost to nothing. On the other hand, it would appear very hard to deprive a man who has no natural heirs, of the direct and personal advantage of making a will. He may have friends as dear to him as brothers or sisters might have been. Besides, by depriving him of the privilege of disposing of his fortune in favour of his friends, you may induce him to dispose of it in annuities on himself. This would be a kind of encouragement to dissipation, something like a law against economy.

These reasons are no doubt preferable to the interest of the government revenue. At all events, the man who has no natural heirs might at least be allowed to dispose by will of one half of his property. To be content with less would be the way to obtain more, but it is still better not to violate in this respect the principle that a man may dispose of his fortune at his death.

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* In France, a father can dispose by will of a part of his fortune equal only to the share of one of his children.

Whatever has been said with regard to contracts, may be applied to wills with some modifications. The same causes of nullity are applicable here, except that instead of *undue reticence* on the part of the legatee we must substitute *erroneous supposition* on the part of the testator. For instance, I leave a certain property to John Smith, who has married my daughter, and whom I believe to be legally her husband; but it appears afterwards that this John Smith, before marrying my daughter, had married another woman who is still alive.

CHAPTER V.

RIGHT TO SERVICES.

There are as many kinds of services as there are ways in which a man may be useful to another. In this exchange of services between man and man, some are free and others compulsory. Those which are required by the law constitute *rights and obligations*. If I have *a right* to the services of another, that other is under an *obligation* to perform those services for me. These two terms are correlative.

In the origin of society all services were free. It is only by degrees that the laws have interfered to make the most important services obligatory. Thus the institution of marriage has converted into a legal obligation the connexion previously free between man and wife, parents and children. Whatever the legislator may do, there are many services on which he has no hold; it is not possible to require them because they cannot be well defined, or, perhaps because compulsion would change their nature. How could gratitude, benevolence, generosity, be made legal obligations?

The imperfection of the law on such points is in a great degree supplied by the moral code, which is not written but exists in opinion, habits and prejudices; and exercises an undisputed influence where the legislative code ends. The duties which it prescribes, the obligations it imposes under the name of equity, patriotism, courage, humanity, generosity, honour, disinterestedness, derive their strength from the popular, moral and religious sanctions.

There are cases, such as that of master and servant, where a service is required for the advantage of the person who receives it.

In other cases, the advantage of the service is to him who obeys, as, for instance, in the case of guardian and pupil.

The two above services are the elements of all others. The father must be in some respects the guardian, and in others the master of his child. And so of the husband with regard to his wife.

The public services of the magistrate and citizen constitute other classes of obligations which belong to the constitutional code. But, besides the above constant relations, there are some occasional instances

in which the law may require the services of an individual in favour of another.

The means of acquiring rights to services, or, in other words, the reasons which determine the legislator to create obligations, may be referred to the following three heads. 1°. *Superior want.* 2°. *Previous service.* 3°. *Agreement* or convention.

Section 1. *Superior want.* Superior want, that is want on the part of one person to *receive* a service, much greater than the disadvantage to another person to perform it. Each individual has, for the object of his ordinary care, his own welfare, but there are many occasions in which a man may add considerably to the happiness of another by a very small sacrifice of his own. To do in such a case what is in our power to save a person from an evil which threatens him, is a service which the law may require: the omission of this service would be a kind of *negative offence.*

But to be under an obligation of using any endeavours is in itself an evil; every kind of compulsion is an evil. So to require such a service from one person for another, it is necessary that the evil of not receiving it be so great, and that of performing it so trifling, that the positive good thus obtained greatly and certainly predominates. It is not possible to fix precise limits. These will depend on circumstances which it must be left to the discretion of the judge to appreciate.

The good samaritan in affording assistance to the wounded traveller saved his life. This was an act of virtue, and we may say a moral duty. But could such an act have been required as a legal obligation? No; unless the legal enactment had contained a number of exceptions more or less vague. It would be necessary for instance to except a surgeon going to attend on several wounded men in extreme need of his assistance; or an officer joining his post to repel the enemy; or a father hastening to the assistance of his children in danger.

This principle of *Superior want* is the reason of several obligations. The duties required from a father towards his children may be onerous to him: but this evil is nothing in comparison to that which would ensue from his abandoning them. The duty of defending the state may be a still heavier burden, but if the state were not defended it would cease to exist. If the taxes be not paid, there is an end to the government. If the public duties of the Magistrate be neglected, the road is open to crimes of every description.

It is clear that the obligation of performing this or that service falls on this or that individual, in consequence of his peculiar position giving him more than to any other man the power or inclination of performing it. Thus relatives or friends are chosen as guardians to orphans, because this duty will be less burdensome to them than to strangers.

Section 2. Previous service. A previous service is that in return for which some compensation is required from the person who has reaped the benefit of it, to the person upon whom the task of bestowing it has fallen.

Here the object is plainer and it is unnecessary to trust so entirely to the discretion of the judge.

A surgeon has given his assistance to a sick man who had fainted and was incapable of applying for it. A depositary has, without having been required to do so, incurred expenses necessary for the conservation of the deposit in his hands. A man has exposed his life to save some valuable property, or the life of some person, in a house on fire. The property of an individual has been thrown over board to lighten the ship and save the remainder of the cargo. In all these cases, and in a thousand others of the same kind, the laws must allow a compensation for the service performed.

This rule is supported by the strongest reasons. Grant a compensation, and the man who has to make it is still a gainer: refuse it, and the man who bore the burden of the service suffers a loss. The law alluded to is not so much for the advantage of the man who performs the service, as for that of those who may afterwards require such services. It is an encouragement to every person who may have it specially in his power to do, at some trouble or expense to himself, a good office to another, and whose personal interest might otherwise be opposed to his benevolence. These feelings it belongs to the legislator to reconcile as much as possible. Who can say how many evils may thus be prevented?

To hold out the hope of reward is the best means of obtaining services; penalties are comparatively of little use. To punish the omission of a service, it would be necessary first to ascertain that the party concerned had the power of performing it, and no good excuse for not doing so. All this requires a difficult and doubtful inquiry. Besides, what can the fear of incurring the penalty produce? Nothing but

what is absolutely necessary to escape it. On the contrary, the hope of reward stimulates energy, triumphs over real obstacles and produces zeal and ardour, where a threat would have produced nothing but indifference or repugnance.

In duly considering the interests of both parties concerned in the services alluded to, due precaution must be observed to prevent a pretended generosity becoming tyranny and requiring the price of a service which would not have been accepted if not supposed to be disinterested, and which could not be paid for without an actual loss to the person who received it.

Several classes of obligations are grounded on *previous services;* such are the obligation of children to respect and support their parents when in the order of nature the former have grown up to manhood, and the duty of restitution begins. This also is the origin of the right of a wife; when in the course of her union, time has deprived her of the beauty which first attracted her husband.

The pensions paid to those who have served the state rest on the same principle. Rewards for past services are the best means to produce services at a future time.

Section 3. Agreement or Convention. Whatever has been said of *contracts* for disposing of property is applicable to *contracts* for the disposal of services. The same reasons exist in favour of sanctioning the latter, and the same fundamental principle may be laid down: *Every alienation of services is advantageous.* No one takes an engagement unless he considers it profitable to him.

The same reasons which annul contracts in one case, do so in the other; undue reticence, fraud, coercion, &c.

It is not necessary to examine in detail the subsequent causes by which an agreement is cancelled: 1*st. Fulfilment;* 2*d. Compensation;* 3*d. Express or tacit Remission;* 4. *Lapse of time;* 5. *Physical Impossibility;* 6. *Intervention of a circumstance which makes the evil of the agreement greater than its advantage to both parties.* In all these cases the reasons which led the legislator to sanction the service exist no longer, but in the two last cases, however, the difficulty may refer only to a literal fulfilment and an indemnity may be due. If in an agreement one of the parties had alone fulfilled his part, or had done more towards this than the other, a compensation would be necessary to place them both on the same footing

It is not possible to go here into particulars. Each case must be disposed of according to its peculiar circumstances. If however a few simple rules on the subject be well understood no great difficulty can occur. Care should be taken:

1. To avoid producing the pain of disappointment.

2. When a portion of evil is unavoidable, to diminish it as much as possible, by distributing it between the interested parties according to their respective means.

3. To let in that distribution the greatest part of the loss fall on the party, who by his attentive care might have prevented the evil. This will be a punishment for his negligence.

4. To avoid producing an accidental evil greater even than disappointment.

CHAPTER VI.

OBJECTIONS TO JOINT PROPERTY

There is no arrangement more contrary to the principle of utility than that of joint property, particularly where the share of each is indeterminate.

1. It is a constant source of disputes. Far from being a state of satisfaction and enjoyment for the interested parties, it is one of discontent and disappointment.

2. Undivided property always loses part of its value for all the shareholders. It is neglected because not under the charge of personal interest, and nothing is done for its improvement, as none of the parties will for that purpose incur any expense the benefit of which would be shared by all.

3. The apparent equality of this arrangement conceals a real inequality. The strongest takes advantage of his strength; the richest enriches himself at the expense of the poorest.

I do not allude to the joint property of man and wife. Having to live together, to attend together to their own interests and that of their children, they must enjoy in common a fortune often acquired and always maintained by their united care. Besides, if their intentions do not agree, the conflict will not be long, the law has given to the husband the power of deciding.

The joint property of several partners in a mercantile firm is also free from the above objections. Their common object is acquisition and not enjoyment, and on that subject there is not the same room for difference of opinion. Besides the partners are few: they freely select each other and are at liberty to separate whenever they like. It is quite otherwise with regard to landed joint-proprietors.

In England one of the greatest and most obvious improvements has been the division of commons. If you look to the lands which have undergone that happy alteration you will perceive rich crops, neat houses, where all was before bare and unproductive.

There may be circumstances which create exceptions to the general rule In some parts of Switzerland the inhabitants hold most of their

lands in joint property. This may be the most proper arrangement for mountain pasture lands only available during one part of the year.

The objections to joint property are not, except under peculiar circumstances, applicable to rights of passage, rights to water courses, fishing in great waters, &c. or, in other words, the amount of good produced in such cases by common rights, generally exceeds the evil likely to result from them.

CHAPTER VII.

DISTRIBUTION OF LOSS.

This chapter will not be long. It is only necessary to explain the principle.

A thing has been damaged or destroyed; the loss falls in the first instance on the proprietor. But the damage or destruction of the thing in question was due to the gross negligence or to the enmity of another party. In that case the proprietor has a right to compensation, and perhaps besides, the party in fault may be liable to punishment.

But here is a more difficult case. The buyer and vender of some merchandize are at a distance from each other; before the goods sold go from one to the other, they must pass through some intermediate hands. The goods however do not reach their destination or are damaged in the way. Supposing no private arrangement providing for such an accident, on whom should the loss fall? On the buyer, or the vender? I say, on the latter in general, save his action against the intermediate agents, because he may by his care contribute to the security of the merchandize he sells, he may choose the moment and the manner of sending it, and take precautions to insure the discovery of the agent by whose negligence any loss may occur. All this must be in most cases easier to the merchant who sells than to the individual who buys. Peculiar circumstances or private arrangements might of course lead to a different conclusion.

BOOK III.

RIGHTS AND OBLIGATIONS IN A PRIVATE CONDITION UNDER VARIOUS CIRCUMSTANCES.

The circumstances alluded to are the following:

Master and Servant.
Guardian and Pupil.
Father and Children.
Husband and Wife.

If the historical or natural order of these four relations were followed, the last of the list would have been the first, but to avoid repetitions it has been deemed preferable to begin with the simplest case: the rights and obligations of a father and a husband are made up of those of a guardian and master; these two last conditions are the elements of the others.

CHAPTER I.

MASTER AND SERVANT.

The relation of master and servant being a matter of private agreement, little need be said on the subject. The parties concerned may be left to make among themselves any arrangement they deem proper.

The condition of master and apprentice is one in which the former is both master and guardian: guardian as regards the art he teaches, and master with reference to the advantage he derives from the labour of his apprentice. When the produce of this labour becomes valuable it repays the expense and trouble of the master in teaching his art and constitutes his salary or reward.

This salary must of course be greater in proportion to the difficulty of the art in question. Some would require seven days and others perhaps seven years to be learned. Concurrence regulates the amount of labour to be given in payment to the master.

CHAPTER II.

SLAVERY.

Slavery is the state of a man bound to serve for ever another man or those who derive their title from him.

Slavery is liable to many modifications, according to the more or less exact determination of the services the master has a right to demand, and the coercive means he may make use of to obtain them. There was a great difference between the state of a slave at Athens or Sparta: there is more still between the condition of a Russian boor and that of a Negro in the West Indies. But the obligation to serve another man without any limit as to time, constitutes *slavery*.

That masters approve of slavery cannot be a matter of doubt since they might put a stop to it at once if they chose: that slaves have no particular affection for that condition is no less certain since they are kept in it only by force.

It is absurd to talk of the happiness of men without regard to their own feelings, to attempt to demonstrate that a man ought to be happy when he considers himself miserable, and that a condition to which no one wishes to be reduced and from which every one longs to be freed, is a condition good in itself and suited to human nature. It may be that the difference between liberty and servitude is not so great as sanguine and prejudiced men suppose it to be. Habit may in some measure reconcile slaves to their condition, but as already remarked no one enters it by choice, on the contrary every one wishes to change it.

If slavery was established in such a proportion that there would be only one slave for each master, it might perhaps be supposed that on the whole the amount of good would be nearly equal to that of evil. But generally it is not thus. Where slavery is established it becomes in most instances the condition of the greatest number. A master counts his slaves, as his cattle, by hundreds, by thousands. The advantage is on the side of the few, the disadvantage on that of the many. In this respect alone the balance of evil far outweighs the amount of good.

But besides this, a strong argument against slavery is drawn from its influence on the wealth and power of nations. A free man produces more than a slave. If a master should emancipate all his slaves he may indeed be ruined, but their aggregate labour will be more productive than it was before and society will have gained in wealth by the change.

Two circumstances contribute to diminish the produce of slave labour: the want of the stimulus of reward, and the insecurity of that condition.

It is easy to perceive that the fear of punishment is not calculated to draw from a labourer all his productive labour, all the industry he is capable of. Fear rather disposes him to conceal than to exhibit his power. If what he can do was known to his master, so much would be required of him, and he would be compelled to exert himself to the utmost without any reward for so doing. All the labour he can save himself from is a gain for him, the only gain possible in his situation.

It may be that a master, knowing his own interest, will not deprive his slaves of the small profits their industry may obtain; he is aware their prosperity is his, and that to encourage them to labour the hope of an immediate reward is necessary. But this precarious favor, altogether dependent on the caprice of an individual, cannot inspire men with that confidence which directs their views towards the future, shows in daily savings the well founded hope of future enjoyments and extends schemes of fortune to prospective benefits for posterity. This is not a new theory; it is the result of experience in all times and places.

It has been said that the daily labourer is similarly situated as the slave and has no interest in the produce of his labour. Whether he exerts himself to the utmost or not he gets the same pay. Provided he works just enough not to be dismissed he has secured his object.

This remark however is not correct. A good labourer gets a higher pay than a bad one and more readily finds employment. Here is then a reward held out to his exertions. Besides, he has his point of honor and would be ashamed of being noted as lazy or incapable. In addition to this the daily labourer may reckon on every gain as his, no one can deprive him of it; whatever he saves is for him a certain addition to the sum of his enjoyments at some future period.

Notwithstanding all the above objections to slavery, among which no reference has been made to the great evil and corruptive influence of an irresponsible authority, that institution has been sanctioned by the laws of every country, and, in some places where it is closely connected with all the rights of property, cannot suddenly and violently be abolished without producing a large amount of evil. The only unobjectionable way to put an end to it is to give compensation to the masters. The laws acknowledge them to have the same right to the labour of their slaves as other men have to the labour of their cattle or the produce of their own lands, and when it is deemed just and advisable to correct that sad error of legislation, the whole loss should not be allowed to fall on one class of men who are not more to be blamed than their countrymen for the evils of a system with which circumstances, not choice, has more specially connected them.

CHAPTER III.

GUARDIAN AND PUPIL.

The weakness of infancy requires a constant protection. Every thing must be done for an imperfect being who can do nothing for itself. Its physical strength will require several years to grow up to maturity and the growth of its intellect is still slower. At a certain age young persons have strength and passions and have not yet sufficient experience to regulate them. Easily affected by present considerations, too apt to neglect the future, they must be kept under an authority more immediate than that of laws; they must be governed by pains and rewards which act not at long intervals but constantly, and which may be adapted to all the details of their conduct during the course of their education.

The choice of a profession for a child also require that he should be under a particular kind of authority. That choice dependent on personal circumstances, on the expectations, the talents, the inclinations of a young man, is too intricate to be entrusted to a public magistrate. Each case demands a special determination for which a knowledge of particulars which the magistrate cannot possess, is indispensable.

This power of protection and command over persons supposed incapable of protecting and properly conducting themselves without assistance, constitutes guardianship.

The powers necessary for the education of the pupil consist in selecting a profession for him and fixing the place of his residence, and having means of remuneration and correction without which authority would be inefficient. The degree of severity allowed need not be great, as its application is certain and immediate, and the domestic Government possesses an inexhaustible fund of rewards. At an age when every thing is received from a superior there is no gift which may not be made to assume the shape of a reward.

As for the subsistence of the pupil it can be derived only from his own fortune, from gratuitous gifts, or from his own labour.

If the pupil has some property it is managed in his name and fo.

his benefit by his guardian, whose acts, provided they are in accordance with some prescribed forms, are sanctioned by the law.

If the pupil possesses nothing, he is maintained either at the expense of his guardian, as in the most ordinary case where the father or mother is the guardian, or at the expense of some charitable fund, or by his own labour, as for instance when his services are engaged as an apprentice for a certain number of years.

As the duties of a guardian are unpaid, that charge is generally entrusted to those who have most inclination and facility to fulfil it. The father and mother are the best persons for that purpose. Natural affection disposes them more than the law could do to fulfil that duty and still the law is not useless. It is because instances have been seen of children abandoned by their parents that the law has made such an abandonment a legal offence.

If the father before his death has appointed a guardian to his children, it may be taken for granted that no one could know better than himself those who have the means and inclination to fill his place. In that case his choice should be confirmed unless there are very strong reasons against it.

If no guardian has been appointed by the father, the charge will be entrusted to some near relation who may take an interest in the good management of the family property, and, from affection, honour, or sense of duty, will watch over the welfare and education of the children.

Old age, ill health, a numerous family and other similar reasons should generally be considered as exempting a man from the onerous duties of a guardian.

The peculiar precautions against the abuse of this power, with regard to the person or the fortune of the pupil, are in the penal laws against offences. The only thing to consider is the circumstance of an *abuse of trust*, but although this makes the offence more hateful it is not always, as we shall see elsewhere, a reason to increase the penalty: the offender being so situated that the discovery of the offence and its reparation are comparatively easy and the alarm is very limited. In case of seduction the character of guardian is an aggravation of the crime.

As a general precaution the duties of guardian have often been divided, the nearest heir being entrusted with the management of the

property in which he is directly interested, and a more remote relative taking charge of the ward's person.

Some legislators have prohibited guardians from purchasing the property of their wards, or allowed the latter, for some time after their majority, to claim the return of their property sold by their guardian. The former of these prohibitions is not liable to any strong objection, but the latter is apt to injure the interest of the ward, as it may be beneficial to him that his guardian should sell some of his property and its value will be much diminished if the sale is liable to be cancelled several years afterwards. The two precautions appear useless, provided no sale of a ward's property can take place except in public and with the permission of the judge.

A simple and efficient means of protection is that every person be authorized to come forward in a Court of justice in favour of the ward against his guardians, in case of neglect, embezzlement or ill treatment. The law puts thus these weak beings, who cannot protect themselves, under the protection of all generous men.

To be under the dependence of a guardian is an evil which should cease as soon as there is reason to believe that this may be done without the danger of greater evils. But what age should be fixed for emancipation? This can only be done from general considerations. The English law, which emancipates at twenty-one years of age, appears much more rational than the Roman law, which has been followed in almost every country in Europe, and which continues minority to the age of twenty-five years. At twenty-one the faculties of a man are grown up, he is conscious of his power, he yields to advice what he would refuse to authority, and cannot bear to be still treated as a child. A prolongation of the domestic authority would often produce a feeling of opposition and irritation equally injurious to both parties. There are however individuals incapable as it were to grow up to manhood. Cases of this nature may be provided for by *interdiction* which is nothing but a prolongation of minority in consequence of a continued state of infancy with regard to intellect.

CHAPTER IV.

FATHER AND CHILD.

We have said before that in some respects a father was the master of his child and in other respects his guardian.

As a master he has a right to require some services from his children and to employ their labour to his own advantage till the age fixed by the law for their emancipation. This right given to the father is a compensation for the trouble and expense of education.

As a guardian he has all the rights and the duties belonging to that quality.

In the former case the advantage of the father is chiefly attended to, and in the latter that of the child. These two are easily reconciled in the hands of a father in consequence of his affections which dispose him to favor his children much rather than to take advantage, for his own benefit, of the rights conferred upon him by the law.

It might seem at first that the legislator need not interfere between the father and his children, and that he might trust to the tender affection of the former and the gratitude of the latter. But this is an erroneous notion. Experience has proved that it is absolutely necessary for the legislator to limit the paternal power and maintain filial respect.

General Rule. The father must not be entrusted with a degree of power more likely to be injurious to his child than advantageous to himself.

This rule has not been attended to in Prussia, where, as in Rome, the law has given to the father the right of preventing the marriage of his son at any age.

Political writers have on this subject run from one excess to the other. Some have endeavoured to make paternal authority as despotic as among the Romans, while others have shown a disposition to reduce it to nothing. Some philosophers have thought that children, should not be left to the caprice and ignorance of parents but that the state should educate them in common, as was done in Sparta, in Crete, and among the ancient Persians. This is forgetting however that the

public education alluded to was given only to a small class of citizens, the mass of the people being slaves.

To this artificial arrangement, besides the difficulty of making the parents bear the expense and properly dividing it among them, there are insuperable objections. The young men thus educated would not be prepared for the diversity of professions which they must embrace. The choice of a profession depends on so many circumstances that none but the parents can determine it. They alone can judge of their means and their expectations, of the talents and inclinations of their children. In addition to this, the plan in question, which shows no regard to reciprocal affection between parents and children would have the most deplorable results in destroying the love of family, weakening the conjugal union and depriving fathers and mothers of the pleasures they derive from seeing their young family growing up round them. Would they take the same interest in the future welfare of their offspring if they were separated from them? Would industry, no longer stimulated by paternal love, continue to be in the same degree productive.

Lastly, I may add, that the natural arrangement, which leaves to parents the choice and burden of their children's education, may be considered as a collection of experiments having for their common object to perfect the general system. Every thing progresses through that competition among individuals; but submit the whole to the same method, let education assume every where the character of legal authority, and errors are perpetuated and all progress is checked.

CHAPTER V.

OF MARRIAGE.

UNDER any point of view that marriage may be considered, it is impossible not to perceive at once the utility of that institution.

Marriage, as a contract, raised women from a hard and humiliating state of servitude, distributed mankind into a number of distinct families, created a regular domestic authority, extended the views of men towards the future by the affection they bear to their children, and thus multiplied all social sympathies. To appreciate the benefits of the marriage contract it is only necessary to imagine for a moment what men would be without it.

The questions relative to this contract may be reduced to seven: 1. Between what persons should it be permitted? 2. How long should it last? 3. On what conditions should it take place? 4. At what age? 5. To whom should the choice be left? 6. Between how many persons should it be? 7. To what forms is it advisable to subject it?

SECTION I.

Between what persons should marriage be permitted?

If we should wish to be guided by a reference to history, it would be difficult to make a choice among so many contradictory customs as we should find at some time or other prevailing among nations. Examples might be quoted of regular and respected unions which now are considered as criminal, and of prohibitions of marriage which to us appear quite unwarranted. Each nation pretends to follow in that respect the law of nature and looks upon contrary customs with a kind of horror. Let us suppose ourselves in ignorance of all those local institutions, and let us examine the question with reference solely to the principle of utility.

If we look into the interior of a family in which there are persons different in age, sex and relative duties, we shall soon perceive strong reasons to prohibit marriage between certain individuals of that family.

A father, a grand-father, or an uncle holding the place of a father, might take advantage of his power to compel his daughter, grand-daughter or niece to marry him although such a marriage was odious to her. The more necessary the authority of these relatives, the less should be the temptation left to them to abuse it.

This objection applies only to a few cases of incest and is not the strongest. It is from the danger to morals, and from the evils which would attend temporary connexions without marriage, that the most powerful reasons arise for prohibiting certain marriages.

If no insuperable bar existed between near relatives of different sexes living together in the greatest intimacy, that intimacy itself, constant opportunities, affection and its innocent endearments, might produce disastrous passions. Families would be disturbed by suspicions, rivalries, and revenge. The opinion of the chastity of a girl would have nothing to rest upon: youth would be exposed to the most dangerous seductions in the very place where it is less able to resist them.

These objections may be reduced to four distinct heads.

1st. *Evil of rivalry.* Evil resulting from a real or supposed rivalry between one of the married parties and some of his or her relatives.

2. *Prevention of marriage.* Danger of depriving a girl of the chance of getting a husband, by creating suspicions of her chastity in the minds of those who otherwise might be disposed to marry her.

3. *Relaxation of domestic discipline.* Danger of subverting the nature of the relations between those who should command and those who should obey, or at least of weakening the beneficial authority which for the interest of minors must be exercised over them by the head of the family.

4. *Physical evil.* Dangers which would result to the health and strength of young persons from premature pleasures.

From the above considerations it appears desirable that a man should not be allowed to marry,

1. His father's wife or the wife of any of his progenitors. *Objections* 1, 3, 4.

2. His own daughter, grand-daughter, great grand-daughter, &c. *Objections* 2, 3, 4.

3. His aunt. 2, 3, 4.

4. His uncle's wife or widow. 1. 3, 4.
5. His niece. 2, 3, 4.
6. His sister or half sister. 2, 4.
7. His wife's daughter, grand-daughter, &c. 1, 2, 3, 4.
8. His wife's mother. 1.
9. His son's, grandson's, great grandson's, &c. wife. 1.
10. The daughter of his father's wife by a former husband, or the daughter of his mother's husband by a former wife. 4.

The statement of the marriages which a woman should not enter into, would, "mutatis mutandis" correspond with that of marriages which a man should not contract.

Is a man to be permitted to marry his deceased wife's sister?

There are reasons for and against such a permission. The danger of rivalry between the two sisters while both are alive is against it, but the advantage of the children pleads in its favour. If their mother dies it would be better for them to have their aunt for a step mother instead of a stranger. This appears to decide the question, but to obviate the danger of rivalry the wife should have the legal power of refusing to receive her sister into her house. If the wife does not wish to have her own sister living with her, what legitimate motive could the husband have to admit her to reside in his family?

May a man marry his brother's widow?

In this, as in the above case, there is a danger of rivalry opposed to what would be an advantage to the children. But both the objection and benefit are here of much less importance. A man cannot see his brother's wife unless the brother permits it, so that the danger of rivalry cannot be great. Again, a step mother is almost invariably unfriendly to her husband's children by a former marriage, but it is not so with a step father as regards his wife's children. He is in most instances a friend and a second guardian to them. Besides, the uncle is already the friend and protector of his nephews or nieces: they would gain little by his marrying their mother. If their step father does not behave well to them, they may throw themselves on their uncle's protection. The reasons *for* and *against* not being strong, it seems undesirable to put a check on liberty in that respect.

Instead of the reasons above given for prohibiting certain marriages, a vulgar morality decides the question at once by asserting that such marriages are "repugnant to nature."

This supposed repugnance to nature would not in good logic justify a legal prohibition. If the repugnance be true, the law is useless. Why prohibit what no one is inclined to do? The natural repugnance is sufficient to prevent the marriage alluded to. But it is found that the assumed fact is not *always* true, and there vulgar morality has nothing to say. If the marriages in question must be prohibited when they are repugnant to nature, they should be permitted when that repugnance does not exist.

It is very seldom that the passion of love is found to exist within the circle of those among whom marriage should be prohibited. It seems that a certain degree of novelty and surprise is necessary to give birth to it. Persons accustomed to see and know each other from their infancy, generally continue all their life to see each other with the same eyes: the passion of love finds as it were no precise time to begin to exist between them.

Natural feelings thus in general agree with the principle of utility, but it would not be safe to trust to them. There are circumstances where the inclination might exist and where the marriage would be an object of desire if not prohibited by the law and condemned by public opinion.

It has been said that marriages between relatives would produce a degeneration of the species, and that it is necessary to cross the breed among men as among domestic animals. This objection might be strong if under the empire of perfect liberty these marriages were likely to be common.

But it is unnecessary to continue this discussion any longer; too much would have been said already if it were not really advantageous to a good cause to refute the weak and fallacious reasons with which it is attempted to support it. When a depraved man triumphs over a weak argument on a moral question, he fancies he has refuted morality itself.

SECTION II.

How long should the matrimonial union last?

Of Divorce.

If the law should not determine the duration of marriage, if individuals were permitted to enter into that engagement, as into any other,

for a limited period, it is probable that the most common arrangement would not differ much from what it is now.

The man might have for his object merely to satisfy a temporary passion, and this done, he would have had all the pleasures of the connexion without its charges. But it is not so with the woman: that engagement has for her permanent and onerous consequences. After the occasional sufferings of a state of pregnancy and the dangers of child-birth, she has to encounter the troubles of maternity. So the union which would have been all pleasure for the man would begin for the woman a long series of unrequited and unshared troubles, if she had not before hand secured for herself and her child the care and protection of a husband. She gives herself to the man but on condition that he will be the protector of her weakness and will provide for the subsistence of their common offspring. This is the commencement of a society which would last for several years even if only one child was born, but other births strengthen the tie which holds it together, a new prospect opens itself to the pleasures and reciprocal duties of the united pair.

When the mother can no longer expect to have children, when the father has provided for the subsistence of the youngest member of the family, can it be supposed that the society would in consequence be at an end? After the parents have for many years lived together, is it likely they would now think of separating? Habit has made them almost necessary to each other, and besides the prospects of their children are a common centre of affection, a new fund of common pleasures and hopes. The most ordinary period of the union would thus of itself no doubt be that of life.

Woman has yet a further interest in the indefinite duration of the matrimonial engagement. Time, pregnancy and nursing conspire to diminish the effect of her charms: she knows her beauty will begin to fade at an age when the strength of a man is still on the increase: she is aware that after having spent her youth with one husband she could not easily get another, while her husband himself would not experience the same difficulty in obtaining another wife. Hence this condition that her husband should not part from her without her consent. The husband requires a similar promise and thus is contracted a legitimate engagement calculated for the happiness of both parties.

The marriage for life is then the most natural, the most suitable to

the wants and circumstances of families, and the most favourable to individuals in general. If there were no laws on the subject, at least no other laws but those which apply to common contracts, this arrangement would still be the most common because it is the best adapted to the respective advantages of both the contracting parties. Love on the part of the man, love and a proper foresight on that of the woman, the prudence and affection of her parents, all concur to constitute the marriage bond a contract for life.

But what should we think if either of the parties demanded the insertion of a clause which would prevent them from putting an end to the contract if they should both find themselves as miserable under its provisions as they hoped to be happy, and if accordingly they agreed on annulling it? Such a condition would appear contradictory and absurd: any engagement of this kind would generally be considered as rash, and considerations of humanity would seem to require that it should be prohibited.

This cruel and absurd clause is not however demanded by either of the parties: it is the law itself which imposes it upon them as a necessary condition. The law interferes between them when among the illusions of youth they see nothing in the future but a prospect of happiness, and tells them "you marry in the hope of being happy "together, but you enter a prison the door of which shall for ever be "closed against you; should you be ever so miserable I shall be "deaf to your sufferings and the bond which unites you shall not be "broken."

To believe in the perfection of a beloved person, to trust to the eternity of the passion they experience and inspire, are illusions which may be forgiven to young people blinded by love, but legislators are not under the influence of such idle fancies. They know that a violent antipathy may succeed the warmest affection; and still they have deliberately enacted that the engagement shall stand good even when the feeling which dictated it has been replaced by a feeling of an opposite nature. If there existed a law which would not allow a man to have a partner, a guardian, a steward or a companion, except on condition that he should bind himself never to separate from them, every one would immediately be struck with the folly and tyranny of that law. A husband and wife are for each other a companion,

a guardian, a steward and a partner, and still in the most civilized countries legislators have made the marriage bond eternal

If marriage be for most men the only means of satisfying the imperious desire of love, to add to the natural difficulties and danger of that bond is more or less to prevent men from entering into it, to deprive them of its enjoyments, and thus to produce an evil in proportion to the privation imposed. What can be more dreadful to a prudent man than the idea of entering into an indissoluble bond of partnership? The impossibility of ever annulling an engagement is obviously a powerful objection to contracting it.

Add to this the common but just remark that infidelities in marriage are in proportion to its rarity. The greater the number of seducers the greater will be the number of seductions.

Lastly, when death is the only means of delivery, what horrid temptations, how many crimes may result from such a melancholy position! Unknown cases particularly of a *negative* kind, are probably more numerous than those which become known. How easy is a crime, even to hearts perhaps not wholly corrupted, when nothing but inaction is required to accomplish it!

Divorce however is subject to several objections. Let us state and examine them.

1st. *Objection.* "If divorce be allowed, neither of the parties will "consider his or her fate as irrevocably decided. The husband will "look round for a wife who would suit him better than his present "one: the wife herself will entertain similar ideas and make comparisons of the same kind. Hence a perpetual want of security."

1. This evil may also exist under other names in indissoluble marriages when, according to the supposition here implied, the mutual affection is at an end. It is not another wife but a mistress, another husband but a lover, who are then perhaps wanted by both parties. The very permanency of the marriage bond may, in such cases act as a stimulus to a criminal passion. If divorce was permitted there would be more apparent separations, but perhaps fewer real ones.

2. We must not consider only the evil. Each party knowing what he or she may lose would be more careful to continue to please. The same attentions and kindness with which love was first obtained would endeavour to fix it permanently.

3 Girls would not be so often sacrificed to the ambition or vanity

of their parents. The importance of attending to the inclinations of the parties would be more generally felt.

2d. Objection. "Each party considering the union as merely tem-"porary will be indifferent to the pecuniary interests of the other party. "Hence neglect, profusion and bad economy of every description."

The same danger exists in commercial partnerships and is seldom followed by any evil consequences. The matrimonial connexion is necessarily stronger on account of the children, who constitute a common tie calculated to strengthen the reciprocal affection. In the indissoluble marriage bad economy and profusion are much more frequent than in commercial societies. They are but the result of the indifference and disgust of two parties tired of each other, endeavouring to keep away from each other and to procure other enjoyments. The possibility of obtaining a divorce would not prevent the greatest number of marriages being contemplated by the parties as unions for life, and even where the probability of a separation was looked forward to, this would rather tend to prevent prodigality than to give rise to it. Each party would be afraid of giving to the other such a legitimate cause of discontent. Besides, each would feel that, in case of separation, the reputation of extravagance and misconduct would greatly diminish the chance of making another advantageous match.

3d. Objection. "The dissolubility of marriage will give to the "stronger, a disposition to ill-treat the weaker party and thus extort "his or her consent to the divorce."

This is a strong objection which deserves the greatest attention on the part of the legislator. A simple precaution however would much diminish the danger. In case of bad treatment let the divorce be allowed to the ill-treated party and not to the other, that is, let the former not be held entitled to contract another marriage in consequence of the divorce, while the latter may do so at any time after the separation is legally completed. Thus, the more desirous a husband might feel of obtaining a divorce, the more careful he would be of behaving to his wife so that no part of his conduct could be interpreted as a violence to compel her consent.

4th. Objection. "But what will become of the children if the law "breaks the bond which united their parents?"

What would become of them if death had put an end to the matrimonial union? In case of divorce they would not be so badly off as

in case of death. They might then continue to live with the parent whose care is most necessary to them, i. e. the boys with their father and the girls with their mother. The great danger for children on the death of one of their parents, is to be placed under the authority of a step-father or a step-mother. Girls are particularly exposed to ill-treatment in the latter case. But in the divorce of their parents this danger does not exist. Their education would not suffer so much from the separation as it would from the bad example of domestic quarrels. If the interest of children should be a sufficient reason to prohibit a second marriage in case of divorce, it would a fortiori be so in case of death.

The dissolution of a marriage is after all of sufficient importance to subject it to forms which may at least leave to the parties time for reflection. The intervention of a Judge is necessary, not only to ascertain that the consent of the wife has not been obtained by force, but to fix a certain period which must elapse between the application for divorce and the divorce itself.

Divorce is not common in countries where it has been long authorized. The same reasons which prevent legislators from permitting it, prevent also individuals from availing themselves of the permission where it exists. The Government which prohibits divorce, takes upon itself to decide that it knows the interest of individuals better than they do themselves. The law has a bad effect or has no effect at all.

In all civilized countries, a wife who has been ill-treated by her husband, may obtain from the courts what is called a *separation*. Each of the parties may then live separately, but neither of them is allowed to marry again. The ill-treated wife and her husband are subject to the same prohibition, but this apparent equality conceals a very great unequality. Opinion is much more indulgent to one sex than to the other.

SECTION III.

On what conditions shall marriage take place?

The question here is merely to examine what conditions may, under the principle of utility, suit the greatest number of cases. The parties should however, with a few general exceptions, be left to make in their contract any particular stipulations they may agree to.

1*st*. *Condition*. "The wife shall be subject to the authority of "the husband under the protection of the law." A *master* of his wife as to what concerns his own interests, he will be her *guardian* with respect to her's. Between two persons living together, there may at any moment be a difference of opinion. For the sake of peace it is necessary to establish a pre-eminence which will prevent contestations or put an end to them. That pre-eminence must be given to the husband; 1st. because he is the stronger party and such an authority in his hands will make itself respected, whereas if the same authority be given to the wife the husband will be constantly a rebel to it. 2d. It is probable that a man acquires more experience of life and more aptitude to business. In this respect there are exceptions, but we are here establishing only a general rule.

I have said, that the wife should be subject to the authority of the husband *under the protection of the law*, because, although it is necessary, that the husband should be the master, he must not be permitted to become a tyrant, and should he abuse his authority the wife may claim the protection of a court of justice. The interests of women have generally been sacrificed, but those who by a vague notion of justice or generosity would give them a right to absolute equality, are laying for them a dangerous snare. To place them legally above the necessity of pleasing their husbands, would weaken rather than increase their influence. The husband being sure of his prerogative, his vanity is not brought into play, and he enjoys his right of command even when yielding. Substitute to this state of things a rivalry of power, and the pride of the stronger party will make it a dangerous opponent to the weaker; looking more to what has been taken from him than to what still remains, he will soon endeavour to re-establish his superiority.

2*d*. *Condition*. "The husband shall be the sole manager, but the "right of enjoyment shall equally belong to both."

Since the husband is the master, it follows he must be recognized as sole, or rather supreme, manager. Besides the acquisition of property is in general the result of his labour. The common right of enjoyment must be admitted as equal in both; 1st. for the good of equality, and 2d. to give to both parties the same degree of interest in the domestic prosperity. This right is however necessarily modified by the subjection of the wife to her husband.

The diversity of conditions and of the nature of the property would require many details, but this is not the place to give them.

3d. Condition. "The husband and wife shall be faithful to each other." The motives which should constitute adultery a legal offence, are stronger with regard to the infidelity of the wife than with reference to that of the husband, but in the latter case however they are not without force. The infidelity of the husband cannot, like that of the wife, bring into the family the children of a third party, but it is equally injurious to her feelings and affection as her misconduct would have been to his, and it is thus equally calculated to disturb all harmony and peace between them. Besides, the infidelity of the husband tends to produce that of the wife, and thus constitutes at least a first step towards a general corruption of morals.

SECTION IV.

At what age shall marriage be permitted?

Such an engagement should not be entered into before the two interested parties are supposed to understand it, especially in countries where marriage is indissoluble. In that case the right of entering into such an engagement, cannot be admitted before the period when a man is qualified by age to manage his own affairs. It would be absurd that a man might dispose of himself for life, when he cannot alienate the smallest portion of his fortune.

SECTION V.

To whom should the choice be left?

Such a question, that is, whether a husband is himself to select his wife, and the wife her husband, appears absurd, as it seems to imply that the choice might possibly be left to others than the two most interested parties.

The laws should never have left this power to the parents, as they are not qualified to exercise it in a proper manner. Their way of seeing and feeling does not agree with that of their children: love is the chief object of youth; old people do not care for it. fortune, in general, is not a matter of much consequence in the eyes of young persons;

it is every thing in those of the parents. The son wants to be happy, the parents want him to appear so. The son perhaps is disposed to sacrifice every thing to love, the parents too often want him to disregard love altogether.

To admit into their family a son or daughter-in-law who does not suit them, is for the parents an unpleasant circumstance; but is this to be compared with the evil experienced by the child who is not allowed to have the husband or wife believed to be the only being with whom happiness could be obtained? Compare the intensity of the evil in both cases and the probable duration of the life of the parents and that of the children; is there equality? This however merely refers to the right of *preventing* a particular match, but how much stronger would the argument be with regard to parents, who, taking advantage of the timidity and obedient disposition of their daughter, would compel her to take as her husband a man she hates!

After all, in not allowing the parents *altogether* to oppose or compel, they must be permitted to delay and moderate. Two periods might be stated, during the first of which the consent of the parents would be necessary to the legality of the marriage, while in the second period they could only delay the ceremony for a certain time. This time would be employed by them in endeavouring to make their children listen to their advice.

SECTION VI.

Between how many persons should marriage be allowed?

There are two kinds of polygamy: one *polygyny*, or a multiplicity of wives to the same husband, and the other *polyandry* or several husbands to the same wife.

Whatever has been said in favour of polygyny has reference only to a few peculiar cases in which a husband is deprived of the company of his wife, but although such an institution might sometimes be advantageous to men it would never be so to women. For each man thus benefited, there would always be at least one woman whose interest would be sacrificed.

The result of polygyny would be to aggravate the evil of inequality in rank and fortune. A rich man would take advantage of his riches to have several wives. Each of those would have only a por-

tion of a husband, while with any of them a poorer man might have been happy, who by the other arrangement is prevented from marrying at all.

What would become of the peace of families? The jealousy of the rival wives would create among them quarrels in which their children would take a part. There would be two or more opposite parties, each headed by a protectress powerful at least by her rights. From these quarrels between children of the same father, their filial respect would be weakened. Each would at some time or other see in his father the protector of his enemy. All the father's acts of kindness or generosity, interpreted by opposite passions, would be attributed to unjust favour or dislike. The education of youth would be entirely ruined in the midst of these hostile feelings. Among oriental nations polygamy may perhaps exist in peace, there women are kept in a state of slavery, one abuse corrects another; all keep quiet under the same despotism.

From polygyny would result for the husband a great increase of authority. Each wife would endeavour to anticipate her rival in any act calculated to please the husband. Those who have a low opinion of women and think they can never be too much kept in a state of subjection, must find that institution admirable, but those who believe that the influence of the female sex is favourable to the improvement of morals, increases all social pleasures, and that its mild and persuasive authority is beneficial in the interior of the family, cannot but think polygyny extremely objectionable.

It is unnecessary seriously to discuss the merits of polyandry. Too much would have been said already on the first kind of polygamy if it were not of some advantage to show on what ground rests the rule universally adopted among the most civilized nations.

SECTION VII.

To what forms is it advisable to subject marriage?

The forms of this contract must have reference, 1st. to the authentication of the free consent of both parties and of the legitimacy of their union. 2d. To the celebration and notification of their marriage.

Most nations have celebrated marriages with great solemnity, and no doubt ceremonies which strike the imagination contribute to impress the mind with an idea of the importance and dignity of that contract.

In establishing the forms alluded to, care must be taken not to make them so troublesome as perhaps to prevent a marriage where the parties are disposed and qualified for it; nor to allow those, through whose interference the forms in question are to be fulfilled, to take advantage of their power for their private purposes.

END OF THE PRINCIPLES OF THE CIVIL CODE.

III.

PRINCIPLES

OF THE

PENAL CODE.

BOOK I.

OF OFFENCES.

CHAPTER I.

CLASSIFICATION AND SUBDIVISION OF OFFENCES.

THE meaning of the word "offence," varies with the subject treated of. With reference to established laws an offence is any act contrary to the orders of the legislator whether they were proper or not. With regard to the doctrine of utility any act which is contrary to that principle is an offence, and this is the usual meaning of that term in the present work.

The most general classification of offences is the following.

1. *Private offences.* Acts injurious to this or that person or persons, not the agent himself.

2. *Offences against one's self*, by which the agent hurts no one but himself or at least hurts no one but in consequence of the injury done to himself.

3. *Offences half public.* These affect a portion of the community, a district, a religious sect or any other association not so extensive as a nation. It is not a past evil which constitutes them, since if the evil were consummated those who have suffered it might be shown and it would then be a private offence. In half public offences the evil is only prospective; it is a danger threatening, as explained further, certain persons who cannot be identified.

4. *Public offences.* These produce some danger common to all individuals in the community without threatening any one more specially than the rest.

The above four classes of offences may be again subdivided.

Private offences may be committed:

1. Against Persons.
2. Against Property.
3. Against Reputation.

4. Against Condition,* as for instance against the condition of father and child, husband and wife, &c.

Offences against one's self may be divided exactly as private offences.

Offences half public mostly consist in the violation of laws relative to precautions taken by the inhabitants of a district against some physical calamities, such as a contagious disease, inundation, &c. Offences which tend to produce some calamity of this description are a first kind of offences half public.

Those among these offences which can be committed without the intervention of a natural calamity, such as libels, or threats against a body of persons, constitute the second kind of half public offences.

Public offences admit of nine subdivisions.

1. *Offences against external security*, which have a tendency to expose the nation to the danger of a foreign attack; such as any act which provokes or encourages an invasion of territory.

2 and 3. *Offences against the justice and police of the state.* It is difficult to determine the line which separates these two branches of administration. Their functions have equally for their object to maintain the internal peace of the community. Justice however refers more particularly to the redressing of wrongs and the punishment of crimes, and Police to the prevention of crimes and calamities.

The offences here alluded to are those which tend to prevent, misdirect, or oppose the measures taken for the administration of justice or the maintenance of police.

4. *Offences against the public force.* These consist in opposition direct or indirect to the military force employed against internal or external enemies.

5. *Offences against the public revenue* which consist in embezzling, or otherwise diminishing the public revenue or preventing its increase.

6. *Offences against population*, which tend to diminish the number of the members of the community.

7. *Offences against the national wealth*, which tend to diminish it or prevent its increase.

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* Murder is a crime of the first kind, robbery of the second, libel of the third and adultery of the fourth.

8. *Offences against the sovereign.* The collective name of "Government" is usually given in the aggregate to all those who are entrusted with political duties. There is generally in every state either one person or a body of persons who assign and distribute to the members of the Government their duties and privileges, and has or have authority over them all. The person, or body of persons, who exercise that power are called the "Sovereign." The offences here alluded to are those which tend to oppose or deceive the sovereign in the exercise of its functions.

9. *Offences against religion* consist in trying to diminish or prevent the good influence which religion is intended to have over the morality of men. Every religion teaches its votaries that the good will be rewarded and the wicked punished in the next world, and whatever tends to diminish the influence of that principle tends to diminish the assistance which the state derives from it for the preservation of morality and the maintenance of the laws.* The moral notions of men have in general a close connexion with the doctrine and practice of their religion. Although that religion may be false and in many respects objectionable, it might be dangerous to attack it unless this is done gradually and so that at the same time that the understanding perceives the folly of a superstition previously respected, it may be made clearly to see that the notions of morality formerly connected with that superstition have an independent existence, and that the abandoning of one should by no means lead to the abandoning of the other. A calm and moderate discussion of any religious questions must not be considered as a crime against religion; from such discus-

* If among the duties prescribed by a particular form of religion some are obviously opposed to sound notions of morality, it is clear that the influence of that religion will in this respect do more harm than good. The interference of the legislator with religious principles of an objectionable tendency, must depend on the greater or lesser probability of succeeding by opposition in eradicating them. If the legislator's opposition be likely to do more harm than good, he should abstain from direct interference and trust to the slow influence of increased civilization and knowledge.

It is of course unnecessary to remark that, in this Chapter, religion is considered only with regard to its influence on the conduct of men in this world, and independently of its origin and more remote object, with which the legislator has nothing to do *as legislator* however deeply it may interest him *as a man.*

sions the cause of truth which is at the same time that of religion and morality cannot in the end fail to be benefited.

The following further subdivisions of offences will be useful.

A *Complex* offence is that which attacks at the same time the person and the reputation, or the property and the person of an individual, or which includes both a public and a private offence, &c. A perjury which has the effect of saving a guilty person from the punishment he deserves is a public offence against justice; but a perjured evidence which would cause the punishment to fall on the innocent would constitute an offence both public and private.

2. *Principal and accessory offences.* The former has directly caused the evil; the latter has more or less assisted in producing it and may consist in screening the principal offender, favouring his escape, receiving the stolen goods, sharing in the spoil, &c.

3. *Positive and negative offences.* The former is the result of an act done with a certain purpose; the latter is the omission of an act which should have been done.

4. *Imaginary offences*, are acts which produce no real evil but which the error of the legislator, religious or other prejudices, have ranked among offences. In several countries a man is threatened with punishment for lending money to another at a higher than the fixed rate of interest, although the lender is under no legal obligation to lend his money at all, and although the terms on which he does lend it may freely and perhaps gratefully be accepted by the borrower and the loan may save him from ruin. Offences against one's self are, with regard to the public as will be seen afterwards, imaginary evils.

CHAPTER II.

OF THE CIRCUMSTANCES WHICH TEND TO INCREASE OR DIMINISH THE ALARM CAUSED BY AN OFFENCE.

THE alarm given by an offence may vary from the lowest to the highest degree. Independent of all difference in the imagination, temper, sex, or age of those who experience it, its intensity is determined by the following circumstances:

1. The greatness of the evil of the first degree.
2. The good or bad intention of the offender in causing the evil in question.
3. The circumstances under which the offence has been committed and the situation of the offender.
4. The peculiar motives of the offender.
5. The facility or difficulty of preventing the commission of the offence.
6. The facility or difficulty for the offender to escape discovery and punishment.
7. The disposition of the offender as proved by the offence.
8. The condition of the person injured and the liability of those of the same condition to suffer or not to suffer the same injury, and consequently to be alarmed by the act in question.

The most interesting questions of penal jurisprudence depend on the examination of those various circumstances.

SECTION I.

Greatness of the evil of the first degree. Influence of this circumstance on the degree of alarm.

The greatness of the evil of the first degree may be estimated according to the following rules:

1. The evil of a complex offence is greater than that of each of

the simple offences which constitute it. The false evidence which leads to the punishment of an innocent man produces as before remarked. more evil than that which would only cause the release of an offender. In the first case there is both a private and public wrong, in the second instance there is nothing but an offence against the public.

2. The evil of a public or half public offence, when of a nature to spread itself is greater than that of a private wrong. There is more evil done by the communication of the plague to the population of a large country than by communicating it to a solitary person or to the few inhabitants of a small and remote island. This tendency to spread itself constitutes the great enormity of incendiarism and inundation.

3. The evil of a public or half public offence, which instead of multiplying itself falls divided into small fractional parts on several persons, is not so great as it would be if inflicted on one individual. If the public treasure be robbed of a certain sum the evil divided among the community is not equal to what it would have been if the same sum had been taken from a single individual. This principle constitutes the advantage of insurance. The pecuniary losses of individuals may be divided so as to be almost wholly unfelt by any one.

4. The evil of an offence may become greater from some accidental consequences connected with it. If a few days of imprisonment, or a wound, are the cause of your losing a good appointment, or the opportunity of an advantageous speculation, it is clear that those losses increase the evil of the first degree.

5. The total mass of evil resulting from a private offence is of course greater if, besides the individual who in the first instance suffers from it, some derivative evil falls on other persons. If in consequence of an injury done to a man his family is reduced to starvation, the evil of the offence is incontestably greater than it would have been without that additional circumstance.

The evil produced by an offence is also liable to be increased by peculiar circumstances, such as a degree of sensibility unusually great, &c. An injury which from its nature is irreparable is greater than another which would be felt only for a time.

SECTION II.

Influence of the good or bad intention of the offender on the degree of alarm.

When an injury has been done the immediate evil is the same whether the offence was committed purposely or not, but the degree of alarm depends greatly on this circumstance. A man who intentionally injures another is looked upon as wicked and dangerous, whereas if the injury he has occasioned was the result, not of his intention, but of accident or of some mistake, the alarm is by no means so great: instead of having to guard against his malice it is only necessary to take precautions against his negligence, error or ignorance.

Suppose, for instance, a person is found dead on a public road. Should it appear that his death was occasioned by the accidental discharge of a fowling piece, it is evident the alarm would not be so great as if the person alluded to had been murdered by a highwayman.

The people guided by a just instinct usually say of an offender of this description that he is rather to be pitied than blamed. In fact a man of any degree of sensibility cannot but deeply regret the evil of which he has been the accidental cause, and instead of the injury he has done constituting him a peculiar object of alarm, the accident will on the contrary generally tend to make him more than usually prudent.

Thus far the general principle is clear and obvious, but its application is liable to considerable difficulties.

An archer shoots an arrow on which is written "to Philip's left eye." The arrow hits Philip's left eye. Here the intention exactly corresponds with the fact and there can be no doubt on the subject.

A man catches a thief in his house and gives him a severe beating from the effects of which the thief dies. In this case there may have been no intention of committing a homicide.

A sportsman sees a deer and a man near it. He knows that he cannot fire at the deer without some danger to the man; he fires notwithstanding and kills the latter. In this case the homicide is in some degree voluntary.

SECTION III.

Influence of the situation of the offender on the degree of alarm.

There are offences which may be committed by every body, while others can be committed only by men in a peculiar situation. This latter circumstance tends obviously to diminish the degree of alarm. A robbery produces more alarm than the embezzlement of a minor's property by his guardian, because the former evil threatens every one while the latter only threatens the few who are placed under guardians.

Of two murders, one of a rich relative by his heir with a view sooner to obtain his succession, and the other of a man in his house assassinated by robbers, the former, although indicating perhaps a more atrocious character, inspires less alarm than the latter. The man who believes his own heirs incapable of such a crime is not alarmed by the assassination which has taken place. He knows he is in no danger from a similar attempt by any other persons. But the case is very different with regard to the robbery. No one can altogether be secure from the attack of robbers.

This remark applies to abuses of trust, and also to seduction and adultery. These offences produce in general little alarm because they are the result of the peculiar situation of the offender. None can abuse a trust but the man to whom a trust is given. A woman can be seduced only by one of the few men who have an opportunity to see her frequently, to speak to her and in fact are placed under peculiar circumstances with regard to her. Besides no great alarm can result from an offence which implies the consent of the principal sufferer.

It must be observed in modification of the above remarks that if the offender be a man entrusted with great powers, the peculiarity of his position may widen, instead of narrowing, the sphere of alarm. Let a military officer in command of a district commit an act of plunder or tyranny, it is clear that the alarm thus produced will be in proportion to the extent of the power he possesses to commit again the same or a similar offence. In such high situations a mere error may create an intense alarm Suppose an innocent man to be punish-

ed with death by order of a judge honest but ignorant or deceived; as soon as the error is discovered, the public confidence is shaken and the general anxiety may be extreme. Fortunately this kind of alarm may be put an end to at once by merely displacing the ignorant and incapable officer.

SECTION IV.

Influence of the peculiar motives of the offender on the degree of alarm.

If an offence proceeds from a peculiar motive not likely to have any extensive influence, the alarm produced is not great If on the contrary the motive which led to that offence be common and powerful, the alarm will be great because many will feel themselves in danger.

Compare in this respect a murder committed for the purpose of robbery with another murder resulting from revenge. In the first instance the danger of a repetition of the same crime is felt to be universal with regard to those who have any thing to lose, whereas in the second case no one is under any apprehension to be the victim of a similar attack, unless he has an enemy whose hatred and desperate character he can suppose such as might induce him to the commission of an atrocious crime.

Motives are often alluded to as *good* or *bad*, but this seems to be an error of language. Every motive ultimately resolves itself into a prospect of pleasure, or escape from pain. The same motive which in some cases leads to a good or indifferent action, may in others lead to a crime. A poor man steals a loaf, another buys it, or works to be able to buy it. the motive which actuates them is exactly the same, viz. the physical want of food. A pious man establishes an hospital for the poor, another goes on a pilgrimage to Mecca, a third murders a heretic prince, the motive of each may in these three cases be equally that of doing what each considers will gain him the favour of the Almighty. A Mathematician lives in a complete state of seclusion, engaged in the most laborious studies; a man of the world ruins himself and his creditors by living in the most expensive and extravagant

style; a king undertakes a foreign conquest and sacrifices thousands of men to attain his object; a man of talent and energy revives the broken spirit of a nation and triumphs over an usurper: all these men may be animated by motives exactly similar, the desire of reputation, &c. &c.

Every motive might be thus examined and it would appear that each may be the cause of the most praiseworthy as of the most criminal acts. Motives therefore should not be considered as in themselves good or bad.

However, in considering the list of motives, that is, the list of pleasures and pains, they may be classed according to the tendency which they have to unite the interest of an individual with, or separate it from, that of his fellow men. Motives would thus be distinguished as *social* and *selfish*; the former including benevolence, duty, religion, love of reputation; the latter being, pleasures of the senses, pecuniary considerations, desire of self conservation, love of power, antipathy.

The selfish motives are the most influential; nature has entrusted to them the preservation of individuals, but their action must be regulated by the motives of the first class.

Without entering here into a more profound discussion on the nature of motives, let us limit our attention to what is most important to the legislator. To judge of an action its *results* must first be considered independent of any thing else. This being done some regard may be paid to the intention of the agent but the best intention cannot transform a pernicious act into one useful or indifferent, nor can the worst motive change an useful action into a pernicious one. All that motives may do is to palliate the criminality or increase the merit of an act. In the former instance this consideration may render it desirable greatly to modify the punishment to be inflicted.*

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* On this important subject it may be useful to add a few remarks.

A person who commits a crime under the influence of some erroneous notion of duty or religion requires instruction rather than punishment, though some measure of restraint may be necessary to prevent him or others from performing again a similar act.

Some motives have vulgar names which carry with them an idea of approbation or blame by which one should be careful not to be deceived.

The intention of the agent can be taken into consideration only when it is obvious. It would often be very difficult to arrive at the knowledge of the true motive which actuated him when perhaps the act in question may have been the result of several motives widely different in their nature.

SECTION V.

Influence on alarm of the facility or difficulty of preventing the commission of the offence.

If it appears that we can easily prevent the commission of a certain crime, the alarm created by it cannot be great. When the offence alluded to implies the consent of the person who suffers from it, no one can feel with regard to himself much anxiety on the subject. This principle applies to fraudulent acquisition, seduction, duelling, suicide, &c.

If on the contrary the crime be such that no precautions we can take will altogether secure us from it, the most intense alarm may be experienced. This is one of the reasons which makes the evil of robbery much greater than that of theft. Force may obtain many things which might be secured against fraud. A robbery committed in a dwelling house is more alarming than one which takes place on the highway, and more so again if combined with murder and incendiarism than if effected by less violent means.

The severity of the laws against domestic theft is no doubt grounded on the difficulty of preventing that offence, but the aggravation which

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neutral name, that is one which carries with it no such idea of praise or blame, should be substituted in all philosophical arguments. For instance, instead of avarice and cupidity say the desire of wealth: instead of vanity the love of reputation; instead of cowardice, desire of self conservation: avarice, cupidity, vanity and cowardice are nothing but an excessive desire of wealth, love of reputation and desire of self conservation, but by using those vulgar names in examining the merit or demerit of certain acts the question at issue is unconsciously assumed, and when once any of those terms is allowed to be applied to the act under examination its condemnation follows as a matter of course.

results from that consideration is perhaps not equal to another circumstance which tends to diminish the alarm; that is, the peculiarity of the position which has furnished occasion for the theft. The domestic thief once known is no longer dangerous, he must be in my service before he can rob me. No other man can commit the same offence in any house unless he is first willingly admitted into it, and this generally does not take place without some previous inquiry into his character. A danger which thus exists only with the consent of the person who is exposed to it cannot be very alarming.*

SECTION VI.

Influence on alarm of the facility or difficulty for the offender to escape punishment.

The alarm is greater if from the nature or circumstances of the offence it is difficult to discover its author. In that case the success of the offender is an encouragement to him and others. Every one feels that he may repeat his offence and that others may be induced by his example to imitate him.

SECTION VII.

Influence on alarm of the disposition of the offender as proved by the offence.

The disposition of the offender may be inferred from the nature of the offence and especially from the greatness of the evil of the first degree. It may also be known from particular circumstances in his conduct when he committed the crime. He will appear more or less dangerous as the selfish compared with the social motives which actuated him, will appear to have more or less influence over him.

The disposition of the offender must in some degree regulate the

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* The chief objection however to the excessive severity of the penal law against domestic theft is that it often prevents masters from prosecuting offenders of that description.

punishment, not only because that circumstance modifies the degree of alarm, but because it at the same time shows the sensibility of the criminal. It is not necessary to use means equally strong to repress a *weak* but not altogether *bad* man, as to restrain a villain whose mind is hardened in crime.

If the party who has been injured was incapable of defending himself, or already suffering from some calamity a natural feeling of compassion and generosity should have restrained the offender. Such a circumstance is calculated to prove that he possesses a more than usually dangerous disposition.

If the person injured was his superior whom he was most particularly bound to respect; if he was under no influence of motives of revenge or momentary anger, but committed the crime out of gratuitous cruelty and with premeditation; his offence is thereby rendered more atrocious and produces a more intense alarm.

Conspiracy is also a proof of particular depravation, as it implies not only premeditation but also being sufficiently familiarized with crime not to be any longer ashamed of avowing one's villany to others.

To these causes of aggravation two others, more difficult to classify, may be added; they are: falsehood and abuse of trust.

1. Truth is one of the first wants of man. At every instant of our lives we are obliged to ground our judgments and regulate our conduct on facts which cannot for the most part be verified by our own observation. Thence arises the most absolute necessity to trust to the assertions of others. If there be in those assertions any degree of falsehood, it follows that our judgments must be erroneous and our expectations disappointed.

The importance of truth is so great that the least violation of its laws, even in trifling matters, is objectionable. The slightest deviation from it is a first transgression which brings on another and familiarizes the mind with the disgraceful habit of lying.

2. An abuse of trust can only take place under particular circumstances, that is, when the offender was under some special and strict obligation which he has violated.

Although if an offence be aggravated by either of the two above circumstances this no doubt must give a more unfavourable idea of the disposition of the offender, it is not always however a reason to in-

crease the punishment. It is sufficient to modify it with reference to the particular cause of aggravation as this will be explained when we shall treat of the means to establish an analogy between crimes and punishments.*

Is any unfavourable inference to be drawn against the disposition of an individual from doing any act not opposed to the principle of utility, but condemned by public opinion?

Not always, particularly if the performance of that act resulted from the belief that it was not criminal. Although an honest man in most cases regulates his conduct on public opinion, there may be instances where he is not bound to surrender his independent judgment. Should a monk violate in secret some absurd or painful practices of his convent it does not follow that he is a dangerous member of society

CHAPTER III.

OF SOME CIRCUMSTANCES WHICH TEND TO EXTENUATE THE OFFENCE.

Of cases in which there is no alarm.

THE circumstances tending to extenuate the offence may be reduced to eight

1. Good faith.
2. Self preservation
3. Provocation.
4. Defence of another person.
5. Yielding to menaces.
6. Obedience to authority.
7. Intoxication.
8. Infancy.

All these circumstances except the two last have in common that the will of the offender did not originate the offence. The first cause is to be found in some other person or in some accident. If it had not been for that first cause independent of him he would not have offended, and if he were not punished his future conduct would nevertheless be as good as if the offence in question had not been committed.

Each of those circumstances would require long explanations, but at all events a great latitude must be left to the judge to appreciate all those means of extenuation.

Is it for instance a provocation? The provocation, to extenuate the offence, must have been recent. What period may be considered *recent* in such a case? It is difficult to fix a limit but in general one night should not have past since the provocation was given. However a consideration of all the circumstances of each particular case will help to appreciate the degree of extenuation which an injury previously received may afford.

If the evil was done in self defence it will be proper to examine how far the whole evil inflicted may have been, or may have appear-

ed, absolutely necessary for the preservation of the individual who inflicted it. In cases of evil done by a person acting under the influence of threats or superior orders the object of the inquiry will be how far those threats or those orders were calculated to deprive him of his usual liberty of judgment and action.

In case of intoxication it is necessary to ascertain if the intoxication was real or if the object of the offender in drinking to excess had not been to harden himself for the commission of the offence. The excuse of intoxication should perhaps be admitted but once at the most The man who knows from experience that wine renders him dangerous does not deserve much indulgence for the offences into which drinking to excess may betray him.

As for infancy it is not easy to define it by precise limits. Of course a child of five or ten years of age cannot be judicially punished for incendiarism or murder. But where are we to stop? It seems that, under legal age, infancy may in general form a proper ground of extenuation, though this however should be left to be determined in every particular instance after a careful inquiry into all the circumstances of the case.

There are cases in which an offence does not create any alarm because none of those who are exposed to the threatening danger can be aware of it.

This circumstance explains the indifference shown by some nations to the crime of infanticide, that is, the murder of a new born infant with the consent of its parents. If the murder should be committed withour their consent, the alarm would be nearly as great as if a grown up person had suffered. The tender affection of the parents is apt to be alarmed for their children in proportion to the helplessness of the latter.

Infanticide as above defined creates no alarm because new born babes cannot know of the danger with which the example threatens them and their parents are not afraid of an evil which cannot happen without their own consent. But although the crime in question produces no evil of the second degree it should be punished at least as a first step to other crimes and as proving a dangerous disposition in those who commit it. Feelings of respect for humanity can never be too much strengthened; the man who coolly puts an end to the life

of his innocent child is one who would probably not scruple to commit acts of a more alarming description. But notwithstanding the shocking nature of this crime and its brutalizing tendency the laws have often carried their severity with regard to it to an excessive degree. The punishment of a cruel and disgraceful death has been inflicted on an unfortunate girl, who, a mother before she was a wife, sacrificed one of the most powerful instincts of nature to the wish of concealing her shame, whose very offence proved an excessive sensibility and whose crime does not excite the alarm of the most timid or cannot be an object of painful and bitter regret to any one but herself.

CHAPTER IV.

MEANS OF JUSTIFICATION.

THERE are circumstances in which an act prohibited by the laws is from special causes free from any evil tendency. The causes which justify such an act are the following.

1. Consent.
2. Escape from a greater evil,
3. Medical practice.
4. Self defence.*
5. Political power.
6. Domestic power.

We shall see that these circumstances justify an act, either in proving that no evil has been done or that the good preponderates over the evil.

1. *Consent.* If the person on whom the evil in question has been inflicted consented to it, it is natural to suppose that for him the evil did not exist or was more than compensated. Hence the jurist's general rule: "No injury is done to a person with his consent." This rule is based on two very simple propositions, 1st, that each man is the best judge of his own interest; 2ndly, that no man would consent to what he believes to be on the whole injurious to him. The rule in question is however liable to several obvious exceptions where the consent alluded to may be the result of fraud, force, madness, delirium, infancy, or intoxication.†

2. *Escape from a greater evil.* This is the case where an evil is done to prevent a greater one, in plagues, in sieges, storms, wrecks, famines, &c. The preservation of the community is the supreme law.

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* When the right of self defence is exceeded the motive is only a ground of *extenuation*, but where the limit is not passed it is a complete means of justification.

† In most countries the rule alluded to in the text is not considered to extend to the act of killing another person with that person's consent.

To avoid intercourse with men attacked with the plague it is allowable to refuse the entrance of a port to a ship in distress, although such a refusal should expose that ship to the greatest peril. When a ship is in danger of foundering, one part of the cargo is thrown over board to save the other. But to justify such remedies several circumstances must first be ascertained, viz. the certainty of the evil to be avoided or removed; the want of any other less expensive means of escaping from it; the certain efficacy of the proposed remedy or at least the certainty that it offers the only chance of escape and cannot be worse than the anticipated evil.

This principle is the only one on which a justification of tyrannicide might be attempted. But to get rid of a tyrant it is not necessary to assassinate him; let him cease to be supported and he is lost. The danger of tyranny does not come so much from the personal existence of the tyrant, as from a disposition in some large portion of the community favourable to tyranny. If the attempt to murder him fails, it only serves to render him more cruel and desperate. If it succeeds, the state is torn by opposite factions, or the late tyrant is replaced by another whom the fate of his predecessor perhaps rather tends to render more suspicious and oppressive. The murder of Cæsar was followed by the proscriptions of the Triumvirs. Besides where would the limit of such an assumed right be fixed? Who is to decide whether a ruler is a tyrant worthy of death or not? The best king who ever sat on the French throne was assassinated by a fanatic who no doubt considered him as a tyrant.

3. *Medical practice.* This means of justification is included in the preceding one. A man is in this case made to suffer for his own good. Suppose, for instance, an individual has a fit of apoplexy; must his consent be held necessary to bleed him? None can doubt he would rather be bled than die, and in affording him proper medical treatment his consent may be taken for granted.

The case is different if a man in his senses refuses to undergo a surgical operation though it be considered necessary to save his life. If his friends or physicians were allowed to compel him to submit to it, and should this be admitted as a general principle, it would be to substitute a certain for an almost imaginary evil. The mind of a man on his bed of sickness would often be in constant fear and ap-

prehension of some attempted violence. If some operation be necessary to his recovery the only justifiable course is to persuade him to allow it. A surgeon who out of humanity would operate in spite of his refusal would be answerable for all the consequences, and his intention would scarcely in any degree extenuate his fault.

4. *Self-Defence.* This again is a modification of the second means of justification, since the object is only to prevent a greater evil. Should it ever be necessary to kill an unjust aggressor, his death would not be such a great evil for society as the death of an innocent person. This right of self defence is indispensable. The protection of the law cannot in every instant be obtained and when the danger is imminent recourse must be had to more prompt means of protecting one's self or one's property.

This means of justification however has its limits. No serious act of violence can be justified except in defence of life and property. To repel a verbal insult by inflicting a bodily injury would not be to defend but to revenge, one's self. To do an irreparable injury for the purpose of preventing an evil which it would be easy to repair; or wilfully to use more violence than was necessary to void the apprehended evil would be to exceed the proper limits of self defence.

A man is not only allowed to defend himself but he may claim a right to interfere for the protection of his neighbour, the victim of an unjust aggressor. It is indeed a noble feeling of the human heart which raises our indignation at the sight of the strong oppressing the weak and which makes us, forgetting all personal risk, rush to the assistance of a person in danger. The law, far from endeavouring to repress this generous combination of courage and humanity, should rather honour and reward the man who thus takes upon himself the duty of the magistrate and protects the weak against oppression. It is important to the security of all that an honest man should consider himself the natural protector of another, and in such a case there is not only no evil of the second degree, but on the contrary much good of that kind follows.

5 and 6. *Political and Domestic power.* The existence of a legitimate power implies the necessity of doing some evil to prevent greater evils. A magistrate and a father could not maintain their authority, one in the state, the other in his family, if they were not

entrusted with coercive means against disobedience. The evil they inflict under the name of punishment has for its object the advantage of the great or small community under their authority, and it is scarcely necessary to say that a proper exercise of their legitimate power is a complete means of justification.

BOOK II.

POLITICAL REMEDIES AGAINST OFFENCES.

CHAPTER I.

SUBJECT OF THIS BOOK.

After having considered offences as diseases in the community, analogy leads us to consider as *remedies* the means of preventing them or of repairing as much as possible the evil they may have caused.

These remedies may be divided into four classes.

1. Preventive.
2. Suppressive.
3. Compensative or Atoning.
4. Penal.

Preventive remedies are effected by direct or indirect measures adopted before an offence takes place.

Suppressive remedies are the means tending to put an end to chronic offences actually in existence.

Compensative remedies consist in a satisfaction or indemnity given to the innocent sufferer to compensate the evil he has suffered.

After the evil has been stopped and the sufferer has received satisfaction, some measures remain still to be taken for preventing the offender and others to repeat the offence. This is the chief object of *penal* remedies or *punishments*. What is done is over and cannot be undone; punishment is powerless with regard to the past, its advantages are limited to the future.

There are two modes of endeavouring to prevent an offence: one is to alter or correct the will of those who otherwise might commit it, and the other to take from them the power of offending. Will is influenced by fear, and power taken away by some physical means. Physical restraint however can only in general be exercised on the of-

fender himself after the offence has taken place, but the threat of punishment is calculated to operate upon all, both before and after the offence. We can always hope thus to influence the will because however great the inducement to offend, the evil of the punishment may surpass it.

We shall treat in this Second book of direct Preventive, of Suppressive and of Compensative Remedies. The third book will contain the doctrine of Punishments and the fourth refer to the Indirect means of preventing offences.

CHAPTER II.

OF DIRECT PREVENTIVE REMEDIES.

Before an offence is committed it may in some instances announce itself in several ways: it goes through a process of gradation which often permits to prevent its perpetration.

Powers are given to citizens to protect themselves before the intervention of the law can take place. Such is the right to oppose by force the attempt of an offence, to require for that purpose the assistance of the spectators, to seize the offender and bring him before a court of justice, to consign in the hands of a responsible person a thing which is supposed to have been stolen, &c.

Independently of these preventive powers belonging to all there are others which can only belong to the Magistrate. They are:

1. The power of *admonishment*, that is of giving a solemn warning to the suspicious individual against the line of conduct which there is reason to fear he contemplates following.

2. The power of requiring a promise not to do a certain act which might lead to an offence.

3. The power of taking recognizances for a sum of money which will be forfeited if the offence takes place.

4. The power of calling on a person from whom some offence is apprehended to furnish sureties who bind themselves to pay a certain sum if he commits the offence against which it is intended to protect some individual or the community.

5. The power of partial banishment or of prohibiting the suspicious individual from coming near the threatened person or living in the same place.

6. The placing of guards for the protection of the persons or property threatened.

7. The *seizure of arms* or other instruments likely to be used for the commission of the offence.

Besides these general means of preventing offences there are special ones which apply to special cases. The choice of those means and the mode of applying them depend on a great number of circumstances, but here the principle should not be forgotten, "never to use a preventive means which may do more harm than the offence which it is intended to prevent."

Remarks on Sureties. Of the above Preventive Remedies one appears to require some explanation.

To call on a man from whom some offence is apprehended, to give security for his good conduct is to require that he will find another person who will consent to submit to some stated penalty in case the offence in question be committed by the former. This at first appears contrary to the principle, which will be further illustrated in the following book, that the punishment should be limited to the offender, but in this case a special advantage more than compensates the evil.

The advantage alluded to is the great probability of preventing the threatened offence by the influence obtained over the suspicious person in consequence of the security given. Some friends of his generously come forward and give him a decisive proof of confidence and affection by exposing part of their fortune to save his liberty or his honor. Can he be so vile, so ungrateful as to abuse their kindness and confidence? But suppose even that, imprudent or vicious, he is not at all to be depended upon, still the security given will not be useless: those who have pledged themselves for him, interested in his actions, are as it were appointed by law to watch his conduct. To their own personal interest in the matter, they add the influence over the person in question which results from their generous conduct towards him, and from the right, which should always be left to them, of withdrawing their security and abandoning him to his fate.

The giving of security tends in another way to diminish alarm. It is a kind of insurance. You require the imprisonment of a man who has threatened to injure you. One of his friends comes forward and denies the necessity of such a measure. He says; "I know this man better than you do and I certify that you have nothing to fear from him. As a pledge of my sincerity I am willing to submit to a penal-

ty fixed by the Magistrate if the offence you apprehend be committed.'

Such is the advantage of giving security, it may produce an evil but this happens very seldom. In that case the man who gives security having exposed himself of his own accord to the evil in question no alarm or danger results from his error and misfortune. .

The penalty, which persons standing as securities bind themselves to submit to, must of course be merely pecuniary. Any afflictive penalty would be shocking to the most common notions of justice and would afford no means of compensation.

It is true that the pecuniary fine agreed upon may if not paid lead to the imprisonment of the sureties, but either their insolvency was prior or subsequent to the engagement contracted by them. In the former case they were guilty of fraud by entering into an engagement which they knew their inability to fulfil, and in the latter they are in fault for not having informed the court and disengaged themselves in due time.

The practice of taking security is beneficial in all cases where there are grounds to apprehend a certain offence from some person; in cases of threats; when some highly responsible charge is entrusted to an individual; or with a view to secure the presence of a party to a trial from which he is suspected to be inclined to escape. When the crime laid to the charge of the person suspected is of a very heinous nature nothing but his imprisonment is considered sufficient security that he will not by flight frustrate the ends of justice.

CHAPTER III.

OF SUPPRESSIVE REMEDIES FOR CHRONIC OFFENCES.

CHRONIC Offences are those which are not over in a moment. Such are for instance, illegal imprisonment, usurpation, calumny, keeping up a manufacture injurious to the health of the neighbouring population, smuggling, insurrection, and most of the negative offences such as neglect of duty, non-payment of debts, &c.

The different kinds of chronic offences require different *suppressive* remedies similar to the *preventive* means, a list of which has been given in the preceding chapter. More latitude however should be allowed to Magistrates in the use of *suppressive* than in that of *preventive* means. In the suppression of an offence one thing is clear, some offence has been committed against which some penal enactment has been provided, and there is no fear of doing too much to suppress the evil so long as the means necessary to punish the offender are not exceeded. In attempting to prevent an offence on the contrary, too much precaution cannot be taken because there is perhaps really no intention of committing it; or it may be that the person who intends to commit it is not the individual we suspect, or that the supposed offender would of himself alter his mind, &c. All these possibilities impose the obligation of great care and caution in the use of preventive remedies.

Remarks on the reading of the proclamation to disperse a riotous assembly.

In England, when a riot takes place and a public officer commands by proclamation the rioters to separate, if they do not obey within a certain time an armed force may be ordered to disperse them.

The intention of this law to give a sufficient warning before using force is excellent, but its execution is imperfect. The Magistrate is to go in the middle of the rioters and read the riot act, which no body

hears, and after that those who do not separate are liable to be fired upon or cut down. Instead of merely reading the order to disperse the Magistrate should proclaim it by some well known prominent sign. In the middle of noise and clamour the ordinary means of language are not sufficient, while the exhibition of a red flag, and the use of a speaking trumpet at the same time to proclaim the order in question, would hardly after a few minutes leave to any one the excuse of ignorance.

CHAPTER IV.

OF COMPENSATIVE REMEDIES OR SATISFACTION.

SATISFACTION is the indemnity or reparation received for an injury The satisfaction is complete, if the reparation granted be equal to the evil suffered.

If a sum of money has been stolen, the satisfaction is in general complete as soon as the owner has been repaid with interest for the period during which he was deprived of that money.

If a thing has been lost and destroyed, the satisfaction consists in giving to the injured party a thing of equal value, and a certain indemnity besides for the temporary privation he has suffered.

Satisfaction is necessary to put an end to the evil of the first degree and replace things in the state they were before the offence was committed.

Satisfaction is equally necessary to put an end to the evil of the second degree. Punishment would not be enough for that; it tends no doubt to diminish the number of offences, but this number though diminished is not reduced to nothing and most offences cause a certain degree of alarm. To obviate this, every offence must be as constantly followed by satisfaction as by punishment, and satisfaction should be such that an impartial observer in the same situation as the offended party may think that at such a price he would not much regret to suffer a similar evil. Where there is doubt, the degree of satisfaction should rather go beyond that point than remain short of it.

There are six different kinds of satisfaction.

1. *Pecuniary satisfaction.* Money being the means of procuring the greatest number of pleasures, is an efficient compensation for many evils. It is not always however in the power of the offender to pay this indemnity, nor proper for the offended party to receive it. To offer to a man of honour a sum of money in compensation of an insult would in some instances be considered as insulting him again.

CHAPTER V.

OF PECUNIARY SATISFACTION. OF RESTITUTION IN KIND. OF SATISFACTION BY PUBLIC ATTESTATION.

THERE are instances where a pecuniary satisfaction is required by the nature of the offence and where it is the only one which may be given.

A pecuniary satisfaction is most suitable in cases where the loss suffered by one party and the advantage gained by the other are both pecuniary, as in theft, embezzlement, &c. The remedy and the evil being of the same nature the compensation may be exactly proportioned to the loss, the punishment to the offence.

This kind of satisfaction is not so well adapted to cases where one party suffers a pecuniary loss without the other party making a corresponding profit: as in accidental, negligent or wilful destruction of property.

Its application is still less proper and more difficult in cases where neither the loss of the offended party nor the gain of the offender can be valued in money.

Where the nature of the satisfaction is such that it is difficult or impossible properly to proportion it to the offence, it is likely to fail in its object. The ancient Roman law which imposed a fine of trifling amount in satisfaction of a blow did not secure a man against such an insult: in many instances the punishment must have been entirely nominal. In settling the amount of a pecuniary satisfaction it should not be forgotten that regard must be had to the past and the future. The satisfaction with regard to the future consists merely in putting a stop to the evil of the offence, but with regard to the past a compensation must be given for the evil suffered. To pay the capital of a debt is to satisfy for the future; to pay all the interest due upon it is to satisfy for the past.

The rate of interest given as satisfaction should be higher than the usual rate of commerce, at least when there is reason to suppose bad faith on the part of the offender. If it were not for that excess there

would be cases where the satisfaction would be incomplete, and others in which the offender would actually be left with a profit; that is, a pecuniary profit if his object was to borrow by force at the usual rate of interest, and a profit or pleasure of revenge or of enmity if his object was to injure the other party. For the same reason the calculation must be made at compound and not at simple interest.

Of restitution in kind.

The restitution in kind is of special importance with regard to things which possess a value of affection, such as; family relics, pictures, manuscripts, domestic animals, &c. In other cases however restitution in kind should also be made whenever it is possible and when the party who has suffered may desire it.

A thing taken away, either in good or bad faith, may have passed into the hands of a third person who has honestly come by its possession. In such a case it must depend on circumstances whether the thing in question shall be itself restored to the original proprietor or not. If this loss occurred a long time ago, and from this or other considerations it appears evidently to be of greater importance to the present possessor to keep it, than to the other party to recover it, the former might be confirmed in his possession on such conditions as might be deemed just to the latter.

When a thing stolen has been purchased at an inadequate price it should always be returned to its lawful owner on repayment of the price given. If the inadequacy of the price does not prove the purchaser to be an accomplice, it is at least a suspicious circumstance. I lose a horse worth five hundred Rupees and you purchase it shortly afterwards for a hundred. The horse when discovered in your hands should be restored to me if I am willing to repay you the sum you gave for it. I am still a loser to that amount whereas you lose nothing, though the very low price at which the horse was sold to you, should have made you suspect it had been stolen and induced you to give information to the Magistrate. If your honesty be not doubtful, and any peculiar circumstances should render it advisable to adjudge the horse to you, it should be on condition you pay me the difference between its real value and the price you gave for it. For the latter sum I shall have in the courts of justice my remedy against the thief if he be discovered.

Where the momentary possessor has incurred, without any corresponding advantage, expenses for keeping the thing stolen in proper condition, or adding to its value, he should be liberally repaid for the same. The result of this rule is not only an increase of the general wealth, but a real advantage to the original proprietor since it tends to the protection of his property.

Neither the original proprietor nor the subsequent purchaser should benefit at the expense of each other: both have their remedy, for any loss they may sustain in an action against the offender.

When the restitution of the actual thing stolen cannot be made, that of another similar to it should be insisted upon when possible. For instance: the possessor of an ancient medal steals another exactly like it, but spoils or loses it. The best satisfaction he could give to the proprietor of the latter for the loss of his medal would be to give him the other. A pecuniary satisfaction in such cases is likely to be insufficient, or to fail altogether of compensating the pain of the sufferer. A value of affection cannot well be appreciated by a third party, and it requires an uncommon degree of enlightened kindness and philosophy to sympathise with tastes different from ours. The Dutch florist who buys a tulip root at the price of its weight in gold, laughs at the antiquarian who gives a large sum for a rusty medal; and vice versâ.

A simple restitution in kind affords no satisfaction for the loss of enjoyment during the period which elapsed from the time the thing was lost till it was recovered. This may be estimated in money. For instance: A statue of the value of 100 Rupees has been stolen or illegally taken away. Between this theft and the restitution six months have elapsed. Supposing the usual *interest* of money to be one per cent. per month, the *penal* interest might be taken at one and a half, which for six months would amount to nine Rupees to be given as satisfaction for the past.

In making a valuation of the interest to be paid, attention must be had to the deterioration accidental or necessary of the thing illegally appropriated. The statue may have lost nothing of its value, but if it had, the difference should of course be made good and the interest calculated on the original value. If a horse be stolen in his fifth year and restored five years afterwards, it would not be enough to give as satisfaction for the past the interest of the present price of the horse, for in five years its value must necessarily have diminished.

Of Satisfaction by Public Attestation.

This means of satisfaction is particularly adapted to cases where an injury to any one results from some falsehood; such for instance as a false alarm, false report of the death of a beloved relative, a libel attacking the reputation of a person, a false rumour having for its object to influence the price of some commodities, or of the actions of a company of commerce, the false assumption of another person's name or character. This kind of satisfaction consists in an authentic declaration of the falsehood of the report or imputation, and is not to be given in lieu of a pecuniary indemnity, where the damage may be estimated in money, but should be added to it. The offender might be required as a means of increasing his punishment to be himself the organ of his own condemnation, that is, to read aloud in public the decision passed by the court of justice. He might also be called upon to pay for the printing of a number of copies of the judgment which should be distributed so as to increase as much as possible its publicity.

CHAPTER VI.

OF HONORARY SATISFACTION.

We have seen in the preceding chapter how satisfaction may be given for offences founded on falsehood. But here the case is different. The offence may consist only in a term of contempt, or the infliction of a very slight bodily pain, or even in a gesture. The greatness of an insult to the honour of a person depends entirely on opinion. To tell one that he is a wretch, a low fellow, is not to impute to him any particular act, but merely to insinuate that he is deserving of the contempt of his fellow men. To spit in a man's face or pull his nose is to inflict upon him a very trifling physical injury, and still from the disgrace attached by public opinion to such a treatment many men will run any risk to avoid it, or to protect themselves against the consequences which would follow from tamely submitting to it: this would in fact be considered as a proof that the insult was not undeserved and would act as a kind of encouragement to others to repeat it.

It is perhaps not to be wondered at that legislators have almost entirely overlooked this branch of security. The physical evil, a common measure usually fair enough of the greatness of the offence, is here almost null, and the remote consequences have escaped the attention of those by whom laws have been enacted.

Duelling.

In Europe duelling is the only substitute for the laws by which individuals should be protected against insults to their honour. A man has received from another an insult for which the law affords him no adequate redress, and which would disgrace him in the eyes of society if he allowed it to pass unpunished. What can he do? He calls on the offender to meet him with deadly weapons and to run the risk of killing him in an equal fight or of being killed himself.

It is no doubt very absurd that the brutal and unprovoked act of a bully should be considered to bring disgrace on an honourable man,

and should compel him to have recourse to such an extreme measure as a duel for the protection of his honour, but the fault is in the popular sanction and especially in the insufficiency of the law. The practice once established the following consequences necessarily result from it.

The first effect of a duel is to remove in great measure the evil of the offence. Not only the offended party is no longer specially exposed to a repetition of the insult, but he has saved himself from the disgrace which that insult would have inflicted upon him if meanly submitted to. The disgrace is not in the receiving of an insult but in a mean submission to it.

The second effect of a duel is to act as a punishment, and thus to check generally the repetition of similar offences. Every new instance of a private combat is a promulgation of the penal laws of honour, and reminds men that no offence can be committed against it without the risk for the offender of a fight, which may end in a severe bodily injury or death itself. Thus a man of spirit, who in the absence of a protective law, exposes his life to obtain satisfaction for an insult, adds to the general security in protecting his own.

Considered as a punishment duelling is however extremely defective.

1. It is not always applicable; women, children, or men not possessed of a sufficient degree of courage cannot thus protect themselves. Besides, prejudice has confined this singular practice to men of a certain class; a common labourer, or shop-keeper, insulted by a gentleman would not obtain from him that kind of satisfaction. In such cases, however great the insult may be it is in this respect an evil without remedy and here as a punishment duelling affords no protection.

2. It is not always even a punishment at all, because public opinion attaches to it a reward which may appear to many greater than its dangers. That reward is the honour of having given a proof of spirit and courage. Many instances might be quoted where one of the parties was on that account actually desirous to fight a duel.

3. Duelling as a punishment is also objectionable on account of its excessive severity. To use an expression which will be explained elsewhere it is a penalty too *expensive*; sometimes it is true no injury at all or a very slight injury follows from it, but at other times a se-

vere wound or death ensues, that is, a much more severe punishment in most instances than the original offence deserved.

4. The worst of duelling as a punishment is that the infliction may fall on the offended party as well as on the offender. The former is even perhaps more exposed to it than the latter, because the man who insults another is the more likely of the two to have prepared himself to go through the duel with the least danger to himself and the greatest to his adversary.

5. Another objection to duelling is that it aggravates the evil of the offence for the man who has not sufficient spirit to have recourse to it in satisfaction of an insult.

6. In some cases the evil of duelling falls on a person by whom no direct insult has been received. Thus a friend, a brother, a husband taking part for a friend, a sister or a wife incapable themselves of obtaining satisfaction for an insult offered to them, compromises his life in consequence of a fact foreign to himself and on which he could have had no influence.

It is evident that duelling as a branch of penal justice is absurd and monstrous, but there can be no doubt that it answers its chief object, which is to wash off the stain which an insult would otherwise leave on the honour of the man who resorts to that practice in self defence. Whether this justifies it or not it is interesting to the legislator to examine how such result follows from it.

A man who has suffered himself to be insulted is in public opinion disgraced for his weakness and cowardice; he can no longer put himself on a par with those who were lately his equals, he cannot expect that the same regard should be paid to him. But if after having received that insult he offers to risk his life against that of his adversary in an equal fight, he thereby relieves himself from the state of humiliation in which he found himself. If he falls, he is at least saved from public contempt, or the insolence of his enemy. If the latter be killed or wounded, the offence has met with its punishment; it will be a lesson for the offender or others who might be tempted to imitate him. If both parties escape uninjured, still the duel is not useless. It proclaims the fact that the offended party is not to be insulted with impunity, and that any one who would offend him again would do so at the peril of his life.

But can the disgrace, which falls on the injured person who has not

courage enough to expose his life to obtain satisfaction be justified? Why has a coward always been an object of contempt and scorn? Is this an injurious or useful prejudice?

Although this prejudice be sometimes unjust and a man devoid of courage may be an useful and estimable member of society, there can be no doubt that on the whole the opinion alluded to is favourable to the best interests of mankind. The first passion of man is that of self-preservation, and courage is more or less a factitious quality, a social virtue chiefly supported by public opinion. Anger may give rise to a momentary ardour but a cool and steady courage exists only under the happy influence of honour. The contempt felt for cowardice is thus not an useless feeling; the pain thereby inflicted on cowards is not without advantage to society. The existence of the state depends on the courage of the individuals who compose it, and the more honoured is that virtue the greater will be the number of brave men.

In the silence or inefficiency of the law the man who receives a gross insult and, except under special circumstances, does not demand the satisfaction prescribed by the code of honour, not only reduces himself to a state of humiliation by exposing himself to a repetition of the insult he has received, but he shows a want of courage, that virtue so necessary to the preservation of society, and a disregard for public esteem which in general has such a powerful and happy influence on the actions of men. It is not therefore altogether without reason that he becomes an object of contempt.*

The fault of this singular and unhappy system of honour is not perhaps in public opinion so much as in the inefficiency of the laws with regard to insults. The legislator instead of directly opposing the practice of duelling should endeavour gradually to render it useless by providing more proper remedies against insults, and in the mean time he might perhaps restrict it within narrower bounds by the enactment of penal laws applicable to duelling after due investigation of the particulars of each case, the provocation given and reparation offered, the actual necessity of the duel under the unfortunate obligation imposed by the public feeling, &c. It is difficult to imagine a

* This of course refers only to the case of a man, from *mere cowardice* not demanding satisfaction for an insult offered to him. If he be acting under the influence of higher motives the case is very different.

duel in which one at least of the parties or their friends are not fairly liable to a punishment the infliction of which would be generally approved. So long as the public opinion on this subject remains unchanged, the legal justifiableness or criminality of a duel should rest on the circumstances which led to or attended it.

Of Legal Satisfaction for Offences against Honour.

Offences against honour may be divided into three classes: insults consisting in words or gestures; in blows; in threats. The penalty, analogous to the offence, should operate as a means of satisfaction to the offended party. Here are some of the penalties which might be inflicted.

1. Simple admonishment.

2. Reading of the offender's sentence by himself with a loud voice and on his knees.

3. Humiliating speech or apology prescribed to him.

4. Promenading or exposing in public the offender with an emblematic dress or mask bearing some analogy to his offence.

5. Publicity of the reparation of the insult. The friends, superiors or protectors of both parties being specially called upon to witness it.

6. Banishment of the offender for a certain time from the place where the offended party resides.

7. Infliction of a similar insult on the offender by the offended party himself or by the public executioner

Some of these penalties may appear singular, but as the common means of repression have failed it becomes necessary to try others. The variety of those here proposed would permit of following in the selection of any of them some analogy to the offence committed.

Let us analyse the results of a satisfaction of this nature. The person insulted, reduced to a state of humiliation before his oppressor, could not any where venture in his presence; the future presented to him no prospect but a repetition of insults; as soon however as the legal reparation has been made he can lift up his head and he recovers his wonted feeling of security. He is no longer a weak and wretched being whom any one may tread upon; the strength of the Magistrate has become his; no one will be tempted to renew an insult which has been punished with so much solemnity. His oppressor,

who for a moment had appeared to triumph over the person insulted, has in his turn fallen into a state of humiliation and disgrace: the penalty he has suffered in the presence of so many witnesses shows that he is not to be feared any more than other men: nothing remains of his violence but the recollection of its punishment. He has become an object of pity to the offended party himself.

Had the legislator always properly applied this system of satisfaction, duelling, which is merely a supplement to the deficiency of the laws, would never have come into practice. As legislation becomes more perfect with regard to insults, the practice of duelling will diminish, and in fact it would altogether disappear if honorary satisfactions were such as to satisfy public opinion. Formerly duels were resorted to in cases which it would be held at the present day ridiculous and absurd to settle by an appeal to the sword or the pistol. A person who would challenge an adverse claimant to decide by private combat the right to a piece of land, would be considered as mad, though in the twelfth century such an appeal would not have appeared irrational. This change in public opinion is due chiefly to improvements in the administration of justice which now offers in such cases means of redress preferable to a duel. The same cause will produce the same effect with regard to offences against honour. Few are fond of exposing themselves to pain or death for the sole pleasure of doing so, and nothing but the want of legal protection can drive an honest man to resort to the sad resource of a duel to protect himself.

To give to an honorary satisfaction all possible efficiency the most careful regard must be paid to public opinion. Whatever is held as disgraceful, a look, a gesture, must be construed as an insult. Where such a sign may be so vague as not to be susceptible of proof, let the supposed offender, at the request of the offended party, be called upon by the Magistrate solemnly to declare whether he intended to insult him or not. If he says no, his answer true or false will generally be a sufficient satisfaction to the person offended. In the former case there was really no insult, and in the latter the offender has been reduced to the degrading humiliation of telling an untruth to justify himself.

In making up a list of offences against honour care must be taken not to include among them actions useful to society, such as the censure of public acts, literary and historical criticism.

CHAPTER VII.

OF VINDICTIVE AND OF SUBSTITUTIVE SATISFACTION.

Every kind of satisfaction implying pain for the offender naturally affords a pleasure to the offended party. This pleasure is a clear gain, since it is the result of an act necessary in other respects. The pleasure of revenge considered in itself is like other pleasures a real good. It is innocent so long as it is contained within the limits of the law; it becomes criminal when it goes beyond them. Revenge should not be considered as the most malignant passion of the human heart: antipathy, intolerance, religious and political hatred, are better entitled to that reproach. The most odious, the most dangerous enmity is not that which has a real and legitimate cause, but that which has no rational cause at all.

Useful to the individual, the principle of revenge is also useful, if not necessary, to the public. It urges witnesses to come forward with their evidence, it animates the exertions of the prosecutor in spite of the trouble, expense, and enmity to which he exposes himself: it hardens public pity in the punishment of offenders.

Vulgar moralists have inveighed against the principle of revenge and it is certain it has often led men to the commission of the most frightful crimes. No doubt that the forgiveness of injuries is a virtue necessary to humanity, but it is only after public justice has done her work and has granted or refused satisfaction. Before this, forgiveness of injuries, admitted and carried into practice as a general rule, would not be the friend but the enemy of society. What could be more favourable to the wicked than a principle which would insure impunity to every offence?

The vindictive satisfaction is not given directly, but only results from the infliction of a punishment which on other accounts appears necessary. Although the *degree* of punishment should not be increased merely with the view of satisfying a feeling of revenge, the *mode* of its infliction may be varied for that purpose. Some instances of

this have been seen in the preceding chapter and others will appear when we treat of the propriety of different modes of punishment.

Of Substitutive Satisfaction.

In ordinary cases the offender is the person who must bear the charge of the satisfaction to be given. It thus becomes a penalty tending to prevent a repetition of the offence. But it happens under some circumstances that if the satisfaction were required from the offender himself, he either could not give it or it would not as a penalty have so much effect as if demanded from a third party. This has led legislators to establish a substitutive responsibility in the following cases.

1. Responsibility of the Master for his Servant.
2. Ditto of the Guardian for his Ward.
3. Ditto of the Father for his Children.
4. Ditto of the Mother for her Children when she is their Guardian.
5. Ditto of the Husband for his Wife.
6. Ditto of an Innocent Person who profits by the offence.

1. The responsibility of the master for his servant is grounded on two reasons. First, the obligation imposed on the master acts as a penalty and tends to prevent a repetition of offences. He is interested in knowing the character of his servants and watching their conduct. Secondly, the condition of master necessarily supposes some fortune, whereas that of servant implies the absence of it and that of suffering party does not imply either one or the other. This last being injured by a man who cannot afford to give him any compensation, but who might have been prevented by his master from injuring him, and the master being presumed better able to afford a compensation than the injured party is capable of bearing the loss, there is a positive advantage in the necessity imposed on the master to give satisfaction.

It must be remarked however that the above reasoning rests on conjecture only, and although it may *generally* correspond with fact it will not always do so. For instance, an accident happens by the upsetting of a waggon. If nothing be known of the injured party it is natural to suppose him less able to bear the loss than the proprietor of the waggon and horses. The former may however be a wealthy

individual, and the latter a poor farmer who would be ruined if called upon to afford compensation for the injury caused through the negligence of his servant. In such a case the servant may indeed be punished but it is clear no proper satisfaction can be given by him or his master.

The obligation of giving satisfaction must of course in the first instance fall on the first author of the evil according to his power; a dishonest or negligent servant who has caused an injury to a neighbour, cannot be admitted simply to refer the injured person to his master as if himself had nothing to do with the consequences of his own act.

The responsibility of the master is not always the same. It is greater where it may be supposed he had it more in his power to prevent the offence, and less where it does not appear that the evil is imputable to any fault of his. In cases where no such power as above alluded to, can be supposed to have existed at all, particularly when the penalty for the offence is such as must necessarily have had on the offender a greater influence than any orders of his master, this substitutive responsibility may even cease altogether.

The general responsibility of a master for his servant may be liable to some objections, but if it were not established the case would be much worse. Should a master wish to annoy, injure, or revenge himself upon his neighbour, he might select some unscrupulous servants, and, without giving them any orders or compromising himself in any way in the eyes of the law, he could easily by availing himself of their zeal, ambition of preferment, of their affection or their vanity, instigate them to do any thing in fulfilment of his wicked purpose, and could enjoy with impunity the evil caused by their hands. Henry II. exasperated by the conduct of an insolent prelate, exclaimed: "Among so many servants who boast of their zeal for my service is there none to revenge their Monarch's cause on that audacious priest?" And these words caused the murder of the prelate.

2. The duties of guardian being in themselves so onerous, it is not desirable to add to the charges they involve by considering the guardian as responsible for his ward. If the latter has property the satisfaction must be given out of it, if he has nothing the satisfaction should be afforded at the public expense as will be explained afterwards.

Although the guardian should not be generally answerable in his fortune for the injuries caused by his ward, if guilty of negligence in preventing them he becomes liable to punishment If fined on that account the amount might very properly be disposed of in favour of the injured party when the case is one in which satisfaction should be given.

3. If a master be responsible for the misdeeds of his servant it is clear a father must, with still greater reason, be answerable for the actions of his children. Entirely in his dependence he can more easily watch and influence their conduct. If they become worthless or dangerous members of society, it is generally in consequence of his vicious habits or his negligence.

Besides, if such considerations were not sufficient, children may be said, save their rights as animated beings, to be the property of their father. The man who has the advantages of possession must bear its charges. It would not be fair that the loss or waste occasioned by children should be borne by an individual who knows nothing of them but their mischievousness or imprudence, and not by the person who finds in them the greatest source of his happiness, and has in his hopes of the future a compensation for the trouble of their education.

The responsibility of the father ceases however as soon as the children reach their majority. The marriage of a daughter equally relieves the father from all responsibility with regard to her conduct. It would not be just that he should be held answerable for the consequences of an act which it was not in his power to prevent.

4. The responsibility of a mother for her children does not exist during the life of their father because her power is absorbed in his. It is only when after his death she has become their guardian that she can be held answerable for their conduct.

5. The responsibility of the husband for his wife is founded on his power over her. When the management of their common property is in his hands it is clear no satisfaction could be given by the wife except through him.

6. An innocent person who has profited by a certain illegal or accidental act, may with justice be held in some respect bound to compensate the loss of the sufferer. For instance, the cutting open or the bursting of a bund has deprived a landed proprietor of the means of irrigating his land, but transferred this benefit to another person

The latter thus unexpectedly benefited ought at least to give some part of his gain to the suffering party. The possessor of a life annuity having a numerous family is killed by accident. The person who paid the annuity, might be required to give to the children of the other party some portion of the unexpected profit he derives from an event which they deplore as a misfortune, and which could not have entered in his calculations.

CHAPTER VIII.

OF SUBSIDIARY SATISFACTION AT THE PUBLIC EXPENSE.

THE property of the offender is the best fund from which satisfaction may be afforded, since in that case it acts as a penalty tending to prevent a repetition of the same offence.

When however the offender is without fortune, the injured party should not for that lose the satisfaction to which he has a right. The satisfaction is almost as necessary as the punishment to remove the evil of the offence: where it cannot be paid by the offender, it should be made good at the public expense. The security of every one is interested in this, and such an obligation imposed on the public treasury is founded on a reason which has all the evidence of an axiom; viz. that a pecuniary loss divided among a whole community is hardly felt at all by any individual, although if borne by only one person it might ruin him.

If a common insurance be useful in commerce it is not less so in general society. The calamities which result from crimes are not lesser evils than those which are caused by natural accidents. If a man sleeps more soundly in a house insured against fire, his rest might still be rendered more comfortable by insuring that house against theft.

Insurances however are exposed to great abuse from fraud or negligence: fraud from those who to obtain an illegitimate indemnity pretend losses which they have not suffered, or exaggerate their actual losses: negligence, from those who, in consequence of their property being insured, may be less careful to protect it from losses which will be made good to them.

The negligence of those who are insured needs not from this circumstance be an object of more than usual apprehension. No one will neglect what he has in the hope that in case of loss he will recover it. The recovery is distant; it will cost trouble and money to effect it; it may be difficult to prove the loss, and after all under the most per-

fect system of procedure the success of a good cause is not always certain.

As regards fraud the danger is much greater. To obviate it the most careful precautions must be taken.

When the injury is the result of an offence liable to a severe punishment and the offender is known, it is difficult to suppose any collusion between him and the sufferer. All that an impostor could do to induce another to *pretend* inflicting upon him a certain injury, would be to divide with him the produce of the fraud; but where the punishment of that offence is greater than the advantage thus derivable from it, the collusion alluded to cannot take place.

Observe that the offence must be well ascertained, and that in general the offender should be known, before the satisfaction be allowed at the public expense. Collusion is not easy where the offender must be brought forward and convicted. Besides, after all, the burden of the proof rests in every instance on the supposed sufferer, and whenever his loss is not by him fully and satisfactorily established the satisfaction may be altogether refused; if the exact amount lost be doubtful, or if the loss occurred from his gross neglect, the satisfaction may be reduced in amount according to the peculiar circumstances of the case.

There are other instances in which satisfaction should be given at the public expense.

1. In a *public calamity, such as an inundation which has caused extensive damage.* The assistance given in such cases by the public is not only founded on the principle that an evil thus subdivided almost entirely disappears, but that the Government as protector of the national wealth is interested in re-establishing the means of reproduction where they may have been destroyed.

2. In case of *losses resulting from the hostilities of a foreign enemy or a public insurrection.* The same reasons exist for affording satisfaction in these as in the preceding cases.

3. In case of *accidental errors of the ministers of justice.* An error in the administration of justice is in itself sufficiently to be regretted, but it would be deplorable indeed if when discovered its immediate consequences were allowed to fall only on the person who has been its victim. It is but fair that the state should follow the

rules of equity prescribed to individuals, and afford compensation for the injury caused by the error of its agents.

Where the pecuniary interest of an individual and that of the public are in opposition, and the justice of the case is doubtful, the former should always be preferred to the latter.

BOOK III.

OF PUNISHMENTS.

CHAPTER I.

DEFINITION AND OBJECT OF PUNISHMENT.

THE most general meaning of the word punishment is "the intentional infliction on a person of a pain in consequence of a certain act done or omitted by that person."

A *legal* punishment is "that which is inflicted, according to certain forms, on an individual convicted of some act prohibited by the law, with the view of preventing the repetition of similar acts in future."

After the commission of an offence the first ideas which occur to the mind of a Magistrate entrusted with the preservation of the public peace, are to prevent the repetition of similar acts, and to repair the evil done.

The most immediate danger comes from the offender himself and this is accordingly the first thing to be provided for. But a danger also exists from any individual who may have the same motives and opportunities of committing the offence.

With regard to the offender himself a repetition of the act may be prevented by taking from him the power of doing it again; by removing the desire to do so; or by opposing to the operation of this desire the prospect of punishment. In the first case, the man no longer *can* commit the offence, in the second he does not *wish* to do so, in the last he *dares* not commit it.

The object of general prevention is answered by the enactments of the penal law and the infliction of punishments which act as *examples;* that is, the punishment suffered by the offender shows to every one what he would have to suffer if he committed a similar offence.

The sole object of punishment is to prevent the repetition of offences. If the evil done was an isolated fact which could never happen again, the punishment would be a pure loss, nothing but an evil added to another. When however it is recollected that, if offences were unpunished, an open field would be left not only to the offender but to all those who might be inclined to follow his example, it is easily perceived that the pain inflicted on an individual becomes a principle of general security. The punishment inflicted by the law is not an act of revenge against a guilty or unfortunate person by whom an offence has been committed, it is simply a necessary sacrifice to the public peace.*

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* In practice however a spirit of antipathy has but too often had an undue influence in the enactment of a penal law or the award of a punishment; and when a very unpopular offence is committed, the general cry for justice against the offender, has probably more in it of a blind and brutal instinct of revenge, than of a notion of the sole legitimate object of punishment.

CHAPTER II.

OF A DUE PROPORTION BETWEEN OFFENCES AND PUNISHMENTS.

MONTESQUIEU and Beccaria have perceived the necessity of a proportion between offences and punishments, but they have rather recommended the question to the attention of legislators than attempted to analyse it. Let us endeavour to lay down the chief rules of this moral arithmetic.

1st. "The evil of the punishment should be for the offender greater than the advantage expected from the offence."

The Anglo-saxon laws which fixed a price for the life of a man, for instance two hundred shillings for the murder of a peasant, six times that sum for killing a nobleman, and thirty-six times the same amount for murdering the king, were not, notwithstanding this pecuniary gradation, in due proportion to the offence. The penalty might in some cases appear as nothing comparatively to the advantage expected from the commission of the crime.

The legislator falls into this error whenever he limits the penalty to be inflicted for an offence the benefit of which is illimited.

Some celebrated philosophers have laid down a principle contrary to the above. They argue that the greatness of the temptation should induce the legislator to diminish the punishment, because the more powerful the temptation, the less strong is any inference drawn from the offence as to the dangerous character of the offender.

The fact asserted is true, but does not affect the above rule. A man who only yields to a powerful temptation may be more deserving of pity and less dangerous than one who does not require any great inducement to commit a crime, but to counteract the influence of the temptation the motive to abstain from the offence must be stronger than the wish to commit it. The punishment must be feared more than the crime is desired. An insufficient penalty is an evil without any compensating advantage, that is, a pure loss.

2nd. "The severity of the penalty must be in direct proportion to the chance which the offender has of escaping it."

Men commit crimes only when they hope to do so with impunity. Were the penalty to consist merely in depriving the offender of all the advantage of his offence, and were no offenders ever able to escape it, it would be quite sufficient for the prevention of crime. What man would be so mad as to commit a crime with the certainty of not obtaining any thing by it but the disgrace the attempt would bring upon him? The man who contemplates the commission of an offence calculates in his mind all the reasons for and against the act he meditates; the hope of impunity exercises the most powerful influence over his determination, and where from the nature of the offence his chances of escape are numerous, the great severity of the penalty can alone counteract the effect of this circumstance over his will.*

From the above it is clear that the more certain the punishment the less severe it needs be, provided it leaves to the offender none of the advantages of his crime.

To increase the effect of a punishment it should as much as possible immediately follow the offence; the prospect of a penal infliction which can only come after the lapse of a considerable period does not produce the same impression on the mind, and besides all delays tend to multiply the chances of impunity.

3. "When two offences of different degree are in concurrence with each other, the greater of the two must be made liable to a more severe punishment than the other, that the offender may have a motive to abstain from the former."

Two offences may be said to be in concurrence with each other when a man has the will and the power to commit them both. A highway man may content himself with robbery, or he may begin with robbery and end with murder. If the punishment be the same whether he commits both crimes or only the former, he has no motive

* The rule here laid down should not be considered as absolute, and should not be thought to warrant the infliction of a punishment so severe as to be quite out of proportion with the evil of the offence, and likely therefore to produce a general feeling of sympathy with the offender and proportional antipathy to the law.

to abstain from the greater crime which perhaps he may on the contrary consider as increasing his chances of impunity. To obviate this, robbery accompanied with assassination must be punished with greater severity than simple robbery.

4. "The greater the evil of an offence the more severe may be the punishment intended to prevent that offence."

A punishment is a certain evil to prevent an uncertain one. To enact severe penalties against light offences is to pay too dearly for protection against a trifling evil. A law which would make the stealing of a rupee a crime punishable with death would be contrary to this rule of proportion. If the penalty of death be allowed to remain on the statute book it should be reserved for the deliberate murderer.

5. "The same punishment should not be inflicted for the same offence on all offenders without exception."

Some regard must be paid to the circumstances which influence sensibility, since we have seen that a punishment, nominally the same, might in point of fact be incomparably more severe for one person than for another.

From what has been said above it must not be inferred that a mathematical precision should be aimed at in the proportion of punishments. Without losing sight of that principle care must be taken that it should not lead to obscurity and intricacy in the law.

CHAPTER III.

OF THE QUALITIES DESIRABLE IN PUNISHMENTS.

THE most important quality of a punishment is perhaps that it should be *certain* and as much as possible *immediate*. Nothing is better calculated to defeat the end of penal enactments than delay and uncertainty in carrying them into effect. If an offender can flatter himself that he will be able to escape the penalty which the law has attached to the offence he meditates, such an expectation destroys in great measure the effect which the idea of that penalty would otherwise produce on his imagination.

But, besides the great attention which the legislator should pay to the importance of the certainty and immediate infliction of punishments in general, every mode of punishment has peculiar advantages or disadvantages which should be carefully taken into consideration. Any punishment is in itself an evil, but it is one which has for its object to produce a greater good. The lesser the evil and the greater the good it produces the more eligible is the punishment; no penalty can be free from all objections and combine all advantages, but it is obvious that those which are least objectionable and most beneficial in their tendency should be preferred by the legislator. To explain the various qualities of punishments will be the object of the following remarks.

It is desirable that a punishment should be:

1. *Economical*, that is, not more severe than is absolutely necessary. Whatever is beyond this is not only superfluous but tends to weaken the influence of the penal system, and to render it unpopular. A punishment should also be economical in the ordinary sense of that word, and should not entail on society any expense that can possibly be avoided. Mutilations consisting in cutting off an arm or a leg are often in this sense most contrary to economy. When a man can no longer labour for his livelihood, if he has no independent means of existence he must either be fed by the state or supported by public

charity. In the former case he is a burden to the community, and in the latter the charge falls only on the most benevolent class of society.

2. *A punishment should be easy to define and understand.* To influence the determinations of individuals penal enactments should offer to their imagination some clear and precise ideas. If the threatened punishment does not distinctly appear in the light of an evil, its presence in the Penal Code will fail to produce the desired effect. If it be in *reality* a greater evil than it is in *appearance*, this surplus of severity is a pure loss, the prospective or preventive effect of a punishment being in proportion to its *apparent* and not to its *real* severity.

3. *Exemplary.* A mode of punishment is exemplary when its infliction is public, and it is both exemplary and economical if the apparent be greater than the real pain. A punishment inflicted in secret might intimidate or perhaps reform the offender, but could produce no effect on the public.

4. *Reformative*, that is, *tending to produce the reformation of the offender.* Every punishment produces a greater or less degree of intimidation, but if the offender, after having been punished, is only kept by fear from repeating the offence, he is not reformed; no favourable change has taken place in his disposition or habits.

A punishment has a tendency to reform when it is calculated to weaken the influence of *corruptive* and strengthen that of *social* motives. Some punishments tend to the greater corruption rather than to the reform of the offender. Disgraceful punishments are dangerous in this respect, and indiscriminate imprisonment is perhaps still more so. When young men guilty of some light offence are shut up in company with hardened criminals, all in a state of idleness, the communications which take place between them are followed by the most deplorable consequences. Such establishments are public schools of crime.

5. *Not unpopular.* A punishment should not be in its nature unpopular. The infliction of such a punishment wounding the sensibility of the public is in this respect an evil; besides, the sympathy created in favour of the offender, tends to weaken the influence of the law, by creating a disposition to evade it or to assist others in doing so. The legislator thus loses the assistance of individuals who abstain

from giving information or evidence against offenders, if they do not help them to escape the legal penalty of their offence. A punishment although proper in all other respects should be changed if it be unpopular.

6. *Remissible.* Punishments cannot of course be remitted as to the past. What has been done cannot be undone, but compensation may be afforded to a greater or less degree in proportion to the evil suffered, and the yet uninflicted portion of the punishment may be remitted. The death of the person after the sentence was executed would of course prevent either remission or compensation. Capital punishment is by its nature irremissible.

The judgments of men are so liable to error, that it is both imprudent and presumptuous in the legislator, without extreme necessity, to deprive himself of the opportunity which the subsequent life of a man convicted of an offence, would leave to atone to him for a possible error of judgment in his conviction.

7. *Divisible or commensurable*, that is, capable of being increased or diminished so as to adapt itself to every degree of an offence. Corporal punishment may vary in intensity more perhaps than in duration, while on the contrary imprisonment can be varied more easily in duration than in intensity.

8. *Equable*, that is, calculated to operate on different persons with similar effect. There are penalties which in some cases are felt as very severe and in others not felt at all. For instance, *banishment*. If a man be desirous to spend a few years in visiting foreign countries, a temporary banishment is no punishment to him. The law of England punishes some offences with the confiscation of *personal* and not *real* property. It follows that if the fortune of an offender consists of the former kind of property only, he is ruined; if of the latter, his punishment is merely nominal. A fine of fixed amount is like the above a penalty most unequable.

9. *Disabling*, that is, calculated to disable the offender from repeating the offence. Imprisonment answers this object whilst it lasts. Capital punishment disables the offender for ever

10. *Analogous.* From an analogy between the crime and its punishment the latter will be better impressed on the memory, and have greater influence on the person who meditates a certain crime. The *talion* is admirable in this respect. 'Eye for eye, tooth for tooth,

&c. The most ignorant is capable of understanding this connection, but the talion is not always practicable, for instance in crimes of treason, perjury, rape, &c., and is besides a penalty too expensive.*

A punishment may be analogous to the offence from the instrument employed in inflicting it, as fire in punishing an incendiary, poison in putting to death a poisoner. The analogy may consist in inflicting a corporal injury; slitting the tongue of the calumniator, cutting off the hand of a man guilty of forgery, &c.

When it is stated as desirable that a punishment should have some analogy to the offence on account of which it is inflicted, it must be kept in mind that this might not be proper in all cases, and should not be attempted to be carried into effect with a scrupulous nicety. A variety of punishments is desirable, but the legislator must not forget the great importance of simplicity in a penal code, nor overlook the other qualities of a penalty more important than analogy.

11. *Convertible into profit.* If the punishment inflicted on the offender may, besides its general effect, be made to afford a pecuniary indemnity to the sufferer and a profit to the state, this circumstance is a recommendation in its favour. A fine is a punishment of this description. If offenders could be made to labour in prison so as to produce more than the cost of their support and the satisfaction due to the offended party, the balance would be a profit derived from the punishment.

The above qualities desirable in punishments are not all of equal importance and cannot be all combined in the same punishment. The great point is to ascertain which penalties combine most of them. To show that a punishment is wanting in some of those qualities is of course not a sufficient reason to reject it.

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* That is, not economical, the evil of which is greater than absolutely necessary.

CHAPTER IV.

OF THE DIFFERENT KINDS OF PUNISHMENTS.

All punishments are included under the following heads:

1. Pecuniary punishments or Fines.
2. Banishment and Transportation.
3 and 4. Imprisonment and Hard labour.
5. Punishments founded on notions of honor.
6. Corporal and Capital punishments.

1. *Pecuniary punishments or Fines.* All the evil produced by this kind of punishment is merely the loss of a certain sum; its peculiar advantage is to be economical, or even convertible into profit to the state, and well adapted for affording compensation to the injured party. No punishment can be made more equal than this if care be taken that the fine shall always be in proportion to the fortune of the offender. Fines instead of being, as they are too often, limited to an absolute amount large enough to ruin a poor man and too small to be felt as a punishment by a rich one, should consist of a certain definite portion of the offender's income or capital. To punish equally two offenders one of which has an income of a hundred and the other one of a thousand rupees, the fine imposed on the latter must be ten times as great as that which the former is required to pay.*

Fines as a punishment are, besides, eminently divisible, and susceptible of being made equable, economical, remissible, easily un-

* This rule could not and needs not be observed with mathematical accuracy. At the moment of trial a rough estimate can generally be made of the means of the offender. If the Judge who fines him were required to state that estimate and the proportion which the fine he imposes will bear to it, his attention would always be directed, at the time of imposing a fine, on the only principle by which the amount of a pecuniary punishment can be justly regulated. In these estimates a permanent income derived from land rent, &c. might be considered as equal to twice the same amount of an annuity, and at least three times that of an uncertain income derived from labour.

derstood, and *not unpopular*. They are not particularly exemplary nor have they any peculiar tendency to the reformation of the offender.

Fines when excessive are liable to a strong objection, as this penalty falls not only on the offender but also on his family. This objection is particularly applicable to wholesale confiscations.

2. *Banishment and Transportation.* Banishment differs from Transportation in being mere exclusion from a certain country without generally any designation of a place of residence, or at all events without deprivation of liberty in the place of exile. Transportation is a removal to another country in which some restrictions are put on the liberty of the offender, who is in fact reduced to a state of temporary or permanent slavery. This punishment falls with very unequal severity on different individuals according to their age, sex, means of existence, &c. It is not exemplary; instead of producing intimidation it has sometimes had an opposite effect. Men have been known to commit a crime with the view of being transported. Simple banishment may perhaps be considered as an economical penalty, but it is not generally so of transportation, and experience has proved this last punishment to be but ill calculated to produce the reformation of offenders.

There is one particular modification of banishment, which appears well adapted to the punishment of offences arising from private enmity, and from which the public has little or nothing to fear. It consists in prohibiting the offender from residing at the same place where the offended party has fixed his residence, or ordering him away from the district where he has committed the offence. This is not only a satisfaction to the offended party, but by removing the aggressor does away with the danger of another quarrel. Such a punishment would be very improper in a case of theft or robbery. What would the public gain by the removal of a thief from one district where he is known, to another where he is unknown and where he would consequently be more dangerous? This applies equally to a foreign country: if you endeavour to get rid of a dangerous character by sending him to your neighbours, and the latter do not altogether refuse to receive him, they will possibly return the compliment by banishing their criminals from their territories to yours.

3 and 4. *Imprisonment and Hard Labour.* Imprisonment may

be divided into simple detention which is not properly speaking a punishment, and penal imprisonment. If an individual be arrested under suspicion of some serious offence and put on his trial, he should not, until convicted, be subject to any hardship beyond the degree of restraint necessary to prevent his escape. He should be kept in a house distinct from the jail.

Penal imprisonment may be made more or less severe according to the degree of the offence and the condition of the offender. Prisoners may in general be made to labour, but in this regard must be paid to the age, strength, sex, and rank of individuals. The food allowed them should be of the coarsest kind consistent with their health, and its quantity limited to what is strictly necessary.

This punishment is very effectual with regard to prevention. The worst member of society ceases to be dangerous while his detention continues.

It is not generally, but it might be made, economical to the state, if not convertible into profit. It is very unequal with regard to the young and the old, the healthy and the sick, the unmarried man and the father of a family whose subsistence depends on his labour. This punishment is divisible, exemplary, easily conceivable. Every one can imagine what it is to be deprived of liberty.

The advantages or disadvantages of imprisonment however depend almost entirely on the mode of its execution.

Where the prisoners are kept indiscriminately together, either in complete idleness or not regularly at work, this punishment instead of tending to the reformation of offenders rather tends to their further depravation. Those who had not yet lost all sense of shame are soon hardened by the example of more determinate criminals. They boast to each other of their crimes, affect through pride to despise the punishment to which they have been subjected, they form a kind of separate community which ridicules the threats and promises of religion, shakes off the restraints of the moral sanction of the great human society, and substitutes for it within itself a new kind of moral sanction founded on intrepidity in crime. Thus all the motives which tend to repress crime are weakened, while all the vicious passions are excited and encouraged.

The principles on which a proper system of imprisonment should be based are:

1st. The *classing* of prisoners. Those who have been put into jail for assault, affray, &c. should be separated from thieves and robbers. Men guilty only of some petty theft, particularly young men, should not be shut up with old and hardened offenders.

2nd. *Labour inside of the jail.* Labour out of the jail cannot be superintended with the same efficiency, and the frequent communications which the convicts have among themselves, or with others, prevent in great measure the effect which imprisonment is intended to produce. Prisoners should after a certain time of probation be allowed a per centage on the produce of their labour. That per centage not to be paid to them while in jail but only on their leaving it.

3rd. *Separate cells* for hardened offenders, wherein solitude and obscurity they would be left for a certain period to their reflections, and would, when appearing sufficiently subdued and at their solicitation, be allowed to work After a further period, they might be permitted to hold some intercourse with other prisoners in whom the discipline of the prison appeared to have effected a reformation.*

This system of solitary imprisonment, without labour at first and afterwards with labour, might be applied to all prisoners, on their entering the jail, for a longer or shorter period according to the degree of their offence.

In a state of complete solitude a man does not experience those feelings of envy, covetousness and enmity which society produces; nor has he any longer that variety of ideas resulting from his relations with other men.

The privation of light again considerably diminishes the number of his external impressions, he is thus reduced to a state of abandonment and passiveness, most favourable to dispose him to be affected by a new train of reflections of quite a different nature from those which used to occupy his leisure under other circumstances. He passes over in his mind the events, bad examples, and the first faults which led him to commit the crime for which he now suffers. He remembers his days of innocence and security, the happiness of which appears greater from the contrast of his present situation. If he has a wife and children, or other near relations, his affection for them revives in

* The superintendent of a prison thus to be regulated would of course require to be a man of liberal sentiments and respectable character.

his heart with a feeling of remorse for the sorrows and disgrace he has brought upon them.

Another advantage of this situation is to be most favourable to the influence of the religious sanction. In this total absence of external pleasures and impressions, religious ideas which the criminal had quite forgotten obtain again influence in his mind. Few men under such circumstances could be indifferent to the promises and threats of a future life. If a minister of religion, taking advantage of this favourable state of mind, offer to the humbled and subdued criminal the consolations of religious instruction, his success is doubly sure from the state of hopelessness in which the unfortunate man finds himself, and from being the only friend, the only protector who comes to save him from utter despair.

This course of discipline is too violent to last long. If continued for too long a period it would soon produce madness or a state of stupid apathy. Its continuance must depend on the nature of the offence, the degree of absolute wickedness shown by the offender, and the proofs he may give of his repentance.

On leaving prison, men who have been convicted of theft or robbery, are placed in the most unfortunate situation if they have no independent means of support. No one will employ them. A person who has been guilty of assault, or was concerned in an affray, or committed almost any offence not connected with the illegal appropriation of other men's goods, may not at the expiration of his punishment be considered as particularly dangerous, but every one is afraid of keeping near him a thief who is likely on the first opportunity to appropriate to himself any thing which falls under his hand; thus deprived of the means of living honestly the unfortunate outcast is as it were compelled in self-defence to resort to his former practices.

This is an evil which deserves the attention of the legislator. A man who has once been convicted of theft or robbery should not be released, or at least should not be lost sight of by the police, until he has obtained certain means of subsistence which may be considered as affording a security for his future good conduct. A mode of imprisonment and labor, which would allow prisoners to save some money during the period of their detention, to be paid to them on their release, would greatly facilitate this. An establishment might be connected with each prison, where released prisoners who could

not give security for their future conduct, should at the expiration of their sentence be further detained, though not with the same strictness as in the jail, until they could get some employment, the whole net profit of their labour being allowed them in the mean time.

4. *Punishments founded on notions of honor.* These punishments are dependent on public opinion If the act which it is intended to punish be not considered by the public as an offence, the person convicted, instead of being disgraced by the punishment he undergoes, may perhaps be pitied as a victim of power, a martyr to whom a compensation is due for the evil he has been made to suffer. The simplest punishment of this kind is that which consists merely in publishing the offence and the name of the offender Next in degree comes the censure pronounced by the Judge, exposure in public with some ignominious dress, or an iron collar, &c. Then branding or impressing upon some part of the criminal's body with a hot iron, or by some other means, an indelible mark of ignominy.

Besides the above punishments which are simply disgraceful, it is clear that some disgrace accompanies generally all punishments. The disgrace is partly the result of the offence and partly of the punishment.

Punishments founded on notions of honor are eminently exemplary when employed with judgment and carefully regulated on public opinion. They are remissible (branding excepted) by a public acknowledgement of erroneous conviction, but they have sometimes a dangerous influence on the moral character of the person on whom they are inflicted. A man publicly disgraced often loses all shame, and thus gets rid of one of the most powerful checks over the not yet hardened criminal. Besides, these punishments are very unequable, and

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* Imprisonment cannot in general be expected to operate the reformation of a hardened offender unless it lasts at least one or two years. In case of a serious offence or the repetition of any offence, it would therefore appear desirable that the imprisonment of the offender should not be less than the above period. Where an offence does not appear to deserve such a heavy punishment, it would be better to shorten greatly the period of imprisonment and confine the offender in a solitary cell. In such a case the only effect of the punishment is to deter, and its duration may be diminished as its severity is increased.

fall most heavily on the most sensitive minds, that is, on those who least require the infliction of a severe punishment.

Branding being an irremissible punishment should be used with the greatest caution and only in case of perpetual imprisonment. It is then a good security against the escape of the offender.

§ 5. *Corporal punishments and Death.*

There are two different classes of corporal punishments, one consisting chiefly in the *immediate* physical pain such as flogging, &c. and the other producing *permanent* consequences. The latter includes all mutilations and death itself.

The punishments of the first class are divisible, and, as regards merely the physical pain, not necessarily unequable if proper regard be paid to age, sex, strength, &c. They are exemplary if inflicted in public.

The objections to those punishments are that: 1st. They have no particular tendency to reform; they may and do indeed produce fear, but that fear is as likely to be accompanied in the offender by anger and a desire of revenge as by repentance. 2dly. They are generally considered as disgraceful and are in this respect very unequable, since for some the physical pain constitutes the only evil of the infliction, while for others it is as nothing comparatively to the disgrace. 3dly. The infliction of corporal punishment, either produces in those who witness it a feeling of sympathy for the criminal which in some measure defeats the object of the example, or if such inflictions are common the public get accustomed to the sight of human suffering voluntarily caused, a circumstance which tends to destroy the most amiable feelings of our nature and to brutalize the mind.

Mutilations whether merely disfiguring a man, or disabling him from labour, for ever disgrace him and are consequently most opposed to his reformation. When a man is once condemned to everlasting infamy he is compelled as it were to persevere in his criminal career. He meets with no confidence, no sympathy, no benevolence among his fellow men; he has nothing to hope and consequently little to fear from them. If he has no means of support but his labour, and the general diffidence and contempt he inspires prevent him from finding any employment, he has no other resource against starvation but to beg or to steal.

Death. The death of an individual can only be assumed to be necessary to the welfare of the community, when, after an insurrection he had provoked has been put down and he is deprived of his liberty, his name is still a rallying point to a party, and his existence may produce a dangerous revolution in the established form of government. In such a case death cannot properly speaking be considered as a punishment; it is an act of precaution or enmity, the advantage of which is even then in general very doubtful.

The penalty of death however is in case of murder analogous to the offence, popular, completely effectual to prevent a repetition of his crime by the offender, and highly exemplary. It however tends to brutalize the mind. The sight of a miserable wretch in the agonies of death, of a violent death inflicted by a public officer acting in the name of the law, is but ill calculated to inspire society with sympathy for human suffering, and with the extreme respect and regard which individuals should entertain for human life. Besides, this penalty is neither divisible nor remissible, and should not therefore be inflicted if it can possibly be dispensed with. Nothing but a stern and unavoidable necessity, can justify the legislator in inflicting a penalty which appears to assume that a judge possesses the privilege of infallibility.

It may be admitted that death is for most men an object of greater fear than perpetual imprisonment, because the latter always leaves some hope, but this is probably not the effect produced by that penalty on the majority of those upon whom it is generally inflicted. The coolness and self composure with which they generally undergo their sentence is a proof of this: their minds are made up before hand on this point, they are prepared "to die game," and the brutal courage they display at their execution, instead of making their death exemplary, commands the admiration of the ignorant and unreflecting crowd.

Whatever may be thought however of the comparative severity of capital punishment or perpetual imprisonment, it can hardly be supposed that the man who is not checked by the idea of the latter punishment should be stopped by that of the former. The penalty of death has in some instances acted as an inducement to the commission of a crime. Men have been known to kill the first person they met, a complete stranger to them, because they were tired of life and prefer-

red being put to death by the executioner to dying by their own hand.

If the penalty of death be retained it should at least be limited to cases of wilful and deliberate murder, under circumstances of peculiar atrocity, and when the evidence direct and circumstantial is so complete as not to leave room for the least doubt of the criminality of the offender. The more rarely this penalty is inflicted the greater will be the impression its infliction will produce.

I have alluded in the above to death only, that is, simple death inflicted in the least painful way possible. All civilized governments have abolished those cruel and disgusting punishments, in which the legislator and executioner appeared to vie with each other in ingenuity for inflicting on the miserable offender all the torments which human nature can bear.

Experience has proved that it is not among the nations where those atrocious punishments prevail that fewer crimes are committed; far from it, the atrocity of criminals appears to keep pace with that of the legal punishments, and in Europe the most hateful crimes have diminished as the cruel tortures by which they were punished have ceased to be sanctioned by the law. If those two undeniable facts do not stand towards each other in the relation of cause and effect, their co-existence proves at *least* how unnecessary for the prevention of crime, the horrid and brutalizing punishments alluded to really are.

CHAPTER V.

OF PRESCRIPTION WITH REGARD TO PUNISHMENTS.

Can punishment be inflicted after any number of years from the commission of the offence; that is, if an offender succeeds for a certain period in evading the legal penalty due to his crime is he no longer to be held a fit object of punishment?

Pardon may be granted after a certain lapse of time for offences proceeding from indiscretion or neglect. During the period which has elapsed since the commission of the offence, the prudence of the offender has been put to the proof and he is no longer a cause of alarm. Forgiveness is to him a benefit without being an evil to any one.

Pardon after a certain number of years may also be extended to offences only attempted but not actually committed. Since the time the attempt was made the offender has partly undergone its punishment since he has lived in constant fear of it. Besides, as he has subsequently abstained from a repetition of the same crime, he may be supposed to have become morally speaking a different man, and to be now an useful instead of a dangerous member of society.*

But if the offence be one of a serious character, as a fraudulent acquisition, a robbery, a murder, &c. it would be odious and dangerous to allow, after any lapse of time, the criminal to triumph over the innocent. The sight of a man enjoying in peace the fruit of his crimes, under the protection of the laws he has violated, would be an encouragement to the wicked, an object of disgust to honest men and an insult to morality and justice.

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* The unsuccessful attempt to commit a crime is not in general punished with the same severity as the crime itself though it may have failed from no want of intention on the part of the offender, because in that case there is no evil of the first degree and neither the alarm nor the danger of a repetition of the offence are so great.

To perceive all the absurdity of an impunity acquired by lapse of time it is enough to conceive the law enacted in the following words: "If the robber and murderer succeed in eluding during twenty years the vigilance of the courts of justice, their skill shall be rewarded, and the enjoyment of the fruits of their crime shall be secured to them."

CHAPTER VI.

OF IMPROPER PUNISHMENTS.

THE cases of improper punishments may be reduced to four: 1. When the punishment is useless or worse than useless. 2. When it is ineffectual. 3. When it is too expensive. 4. When it does not fall on the offender.

1. The punishment is useless when there is no real evil done either of the first or second degree, and worse than useless where the evil of the act proposed to be punished is more than compensated by the good which follows from it, as for instance in cases of some penal infliction in the exercise of paternal and domestic authority, in case of self-defence, &c.

A punishment is also superfluous when the object in view may be obtained by less objectionable means, that is, by instruction or example. If a man has published some dangerous opinions it may not for that be necessary for the law to punish him. If he thought it of any advantage to himself or others to publish his opinions, others will not fail to see their interest in refuting them.

If the principles which constitute an act a real offence have been well understood, it will be easy to distinguish such offences from acts innocent in themselves which antipathy, superstition, or prejudice have placed among crimes. Heresy and witchcraft are offences of this kind.

2. *Ineffectual punishments* are those which could produce no effect on the will, and consequently could have no tendency to prevent the repetition of similar acts; for instance, when the offender acted in ignorance of the law, without intention, or from compulsion. Children, idiots, and the insane, although in some degree influenced by promises and threats, have not generally a sufficiently strong perception of the future to be stopped by the prospect of a remote punishment. Penal enactments would be in great measure ineffectual with regard to them.

If a man, in some particular instance of his conduct, acts under the influence of a fear superior to that of the greatest legal punishment, or in hope of the most complete happiness, no penalty could have any effect upon him. Laws against duels have been disregarded, because a man of honour was more afraid of disgrace than of the risk of capital punishment. Penalties against a peculiar form of worship are generally ineffectual because the hope of eternal happiness is in religious persons stronger than the fear of the stake. The effect of such penal enactments depends of course on the greater or less influence of the opinions opposed to them.

3. *Punishments too expensive.* If the evil of the punishment exceeded with regard to society the evil of the offence, the legislator would have done more harm than good by his law. He would have suppressed one evil by causing a greater one.

A penal law causes: 1st. an evil of privation proportioned to the pleasure which might have been obtained from the prohibited act; 2ndly. an evil of apprehension suffered by the man who has violated the law or by one who is afraid of being charged with having done so; 3rdly. the evil of erroneous prosecutions, a misfortune to which all penal laws, and particularly obscure laws enacted for the prevention of imaginary evils, are liable: a general and blind antipathy creates a frightful disposition to prosecute and condemn on mere suspicion; 4thly. the evil of the punishment itself when actually inflicted, 5thly. the derivative evil suffered by the relatives and friends of the individual who undergoes the penalty of the law. A legislator must take into consideration all these circumstances when enacting a penal law. A comparison of the good and evil consequences of carrying a penal enactment into execution, leads to general amnesties with regard to offences committed from some party spirit by a large number of men, perhaps a third or one-half of the whole community. The punishment of all the offenders would be a greater evil than the evil of the offence.

In peculiar cases if an offender be generally loved, or if he be protected by a foreign power which it would be dangerous to offend, or if he could be of great service to the community, to pardon him would be an act of prudence. The punishment of his offence would be rather injurious than beneficial to the community.

4. *Punishment should be inflicted directly on offenders and on no others.* It is true that an evil inflicted on their friends or relatives would not be unfelt by them, and that when they cannot be punished in their persons or fortune it may still be possible to punish them in their affections. But would it be consistent with general utility to act on that principle?

A penalty acting only on sympathy would not of course in itself have the same influence as if acting directly on the person; the love of self is in most men stronger than the love they bear to their best friends, and this is particularly the case of bad men. Thus a penalty threatening only the persons of the offenders' friends, would produce least effect on those whom the penal law wishes most particularly to influence. If the penalty was to be inflicted both on the offender and on his relatives, for instance his parents and his children, in numerous cases it could only be applied in part since many offenders have either no parents or no children, or neither one nor the other.

Besides, it should not be forgotten that the main object of punishment is to prevent a repetition of the offence, that the threat of a penal infliction is specially intended to act on persons who have generally no very acute feelings of sympathy, and whom no other means would be sufficient to check, and that the influence of such a threat is rather in proportion to the probability of its being carried into effect, than in proportion to the amount of absolute evil held in prospect. Few men whom the fear of a disgraceful personal punishment would not be sufficient to restrain, would be influenced by the threat of such a punishment being also inflicted on their friends. If they commit the offence it is not that they do not care for the punishment with which the law threatens them, but it is because they hope to escape it, and this deceitful hope would generally act upon them in one case as in the other.

After all it may be granted that in some instances, a punishment which would extend to the relatives of the offender, *might* have the effect of preventing an offence which would otherwise have taken place; but would not the evil of such a system be infinitely greater than the evil of the small number of offences it would prevent? Not only the direct evil of the penalty might be ten times greater than if limited to the offender's person, but imagine the alarm it would create and the horror which the punishment of a person avowedly innocent

would inspire. It is only in the infancy of society or among nations in a very imperfect state of civilization, or under the iron rule of a tyrant, that such a gross misapprehension of the proper sphere within which the infliction of the penalties of the law must be limited, can have prevailed to any extent.

There are still however among highly civilized nations some remains of the barbarous jurisprudence which includes in the punishment of the offender his dearest relations. Such are *confiscations* which ruin the children for the faults of their father; the legal principle of *corruption of blood* which prevents a son inheriting the fortune of his grand-father because his father has been guilty of a crime; such are also the legal disabilities of bastards, and the disgrace attached to the relatives of those who have been convicted of crimes held disgraceful. This does not merely refer to public opinion, but to the error of the law, which has in some instances stigmatized the relatives of criminals, as proper objects of public contempt in consequence of the infamy of their relations.

The connections between individuals from relationship, friendship or sympathy, are so extensive and intricate that it is impossible to inflict on the guilty a punishment which will not in some degree fall on the innocent. The payment of a fine by a father, his imprisonment or any other punishment which may deprive him for a time of the means of improving his fortune, will necessarily be prejudicial to the fortune of his children, besides the pain of sympathy and affection which his humiliation, suffering and disgrace, will bring upon them. This however is an evil which all the wisdom and benevolence of the legislator cannot entirely prevent, but instead of adding to it by inflicting a punishment on any but the offender, he should endeavour to diminish as much as possible the portion of evil which the punishment of an offender brings on his innocent relations.

CHAPTER VII.

OF THE POWER OF PARDONING.

The effect of a given penalty with which the law threatens offenders, is in direct proportion to the *certainty* of its being inflicted. The more certain it is the less severe it needs be. What then can be said of a power established precisely to make penalties uncertain?

In the species, as in individuals, the age of passions precedes that of reason. Passion and revenge dictated the first penal laws. But when this rude legislation, founded on caprice and antipathy, began to shock the more deliberate feelings of an enlightened community, the power of pardoning, being looked upon as a protection against the excessive severity of the laws, was thought comparatively beneficial and was established without considering that it is itself an evil.

How often has not clemency been praised as the first virtue of a sovereign! No doubt if the offence be only an attack on his vanity, a libel on himself, or any other injury personal to him, the moderation of the prince is praiseworthy, the pardon he grants is a triumph over himself; but when the offence is against society, a pardon is no longer an act of amiable clemency, it is a real prevarication tending to defeat the ends of justice.

In cases where the penalty if inflicted would do more harm than good by extending to a great number of individuals, as for instance after seditions, conspiracies and public disorders, the power of pardoning may be useful and even necessary; but these cases being foreseen in a good legislative system, the pardon which applies to them instead of a violation is only an execution of the law, while on the contrary pardons without stated motives, results of the favor or weakness of the prince, imply either that the laws are cruel towards individuals or that the government is guilty of cruelty to the public. If humanity sanctions the infliction of punishment for the protection of innocence, it cannot at the same time be consistent with pardons which tend to encourage crime.

If the laws be cruel the power of pardoning may be necessary to

soften their application; but in itself it is nevertheless an evil. Let good laws be enacted and no power be permitted to interfere with their execution. If a penalty be necessary let it be inflicted, if not necessary why enact it?*

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* To check at least the power of pardoning, no exercise of that power should take place without a statement of the motives which appear to render it necessary. Where the law admits the penalty of death it would be desirable to continue in the sovereign the power of pardoning, or rather that of commuting the punishment.

BOOK IV.

INDIRECT MEANS OF PREVENTING OFFENCES.

CHAPTER I.

INTRODUCTION.

The first mode of preventing acts pernicious to society, which occurs to the mind, is to prohibit them and punish the offenders. This constitutes *direct* legislation.

A second method of preventing the acts in question by taking away the power or the will to perform them, is a branch of legislation, which for the sake of distinction, may be called *indirect* legislation.

The indirect means alluded to influence the conduct of men without having the character of penalties, and succeed in many cases where more direct means have from experience been found to be powerless. Here are a few instances.

The high price of commodities is an evil insomuch that it reduces the power of men to obtain them. A high rate of interest has been thought also objectionable as in general falling on the poor. To remedy those evils some legislators have framed a number of rules to fix the price of goods and the rate of interest. The penalties enacted in support of those rules have always been more or less evaded, and the annoyance and oppression they have produced have caused them to increase rather than diminish the evil. There is only one mode of obtaining the object in view, but few governments have been sufficiently enlightened to make use of it, that is, to grant a perfect freedom of commerce. The competition of manufacturers and of capitalists among themselves, is sure to bring down of itself the price of commodities and rate of interest to the lowest possible point

When in anticipation of a bad season grain dealers increase the price of the grain they have in store, or when they carry it from a part of the country where it is scarce into another district where the scarcity is still greater, popular clamour seldom fails to rise against them, and many would greatly approve of restrictions laid by the Government, in such a case, upon the usual liberty of trade. It is certain however that such restrictions would generally be most mischievous. The early increase of price alluded to does comparatively more good than harm, as it leads gradually every one to diminish his expense of grain as much as possible, and the grain saved in this manner being added to the deficient produce of the following season, prevents the scarcity being as great as it would otherwise have been. Besides, the great profits which the grain dealers are in this way occasionally enabled to make, induces many to store up in a good season grain which would otherwise sell at a very cheap rate and be wasted. In the second case stated, it is very clear that if grain dealers are prevented from exporting their grain when they could by doing so realize a large profit, upon which they have more or less reckoned, not only they will be losers to the extent of that difference of price, but the district for the benefit of which the restriction is imposed will not be benefited in the same degree as the other district will be injured. In addition to this, if another year the case should be reversed and the district this time the poorer be then the richer in grain, it will be induced by the previous example given to prevent also the exportation of grain to its neighbour. To crown all, such interference with trade will tend to discourage the traders and consequently diminish the quantity of grain laid in store, and thus add every where to the distress which a scarcity is calculated to produce. The best mode generally for the legislator of preventing, or at least alleviating, the sad results of a deficiency in the crops of the country, is constantly to allow a perfect freedom of trade, that is, to leave the merchants at liberty to import or export their grain at all times as they find it most profitable to themselves.

Another instance of the advantage of free competition may be quoted.

All modern historians have remarked how much the abuses of the Roman Catholic Church have diminished since the establishment of the Protestant Religion. The fear of giving a scandal which would

be an occasion of triumph for the opposite party, has produced a general regularity of conduct and improvement of morals before unknown among the Roman Catholic Clergy, and thus the existence of a rival sect has done what Popes and Councils had vainly attempted to do.

CHAPTER II.

MEANS OF TAKING AWAY THE POWER OF OFFENDING.

I begin with *power* because the means with regard to it are more limited and simpler, and in all cases where the power of offending is taken away the success is certain.

Some of those means, such as imprisonment or mutilation, are so severe that they cannot be used except under peculiar circumstances, and the latter only with regard to offenders already convicted.

Instead of thus addressing himself directly to the offender, it is far preferable for the legislator to obtain the same object, by not leaving within his reach the materials or instruments with which offences are usually committed. The prohibitions relative to the fabrication of instruments for coining, to the sale of poisonous drugs, and to the carrying of certain weapons are indirect means of this nature.

To this head may be referred also the prohibition of the Mahomedan legislator to drink wine. Keeping in mind the great necessity of temperance in hot climates, it is possible that a total prohibition of spirituous liquors, may be better than a permission which however restricted would probably be followed by injurious excesses.

A tax on spirituous liquors is another mode of indirectly preventing an excessive use of them. As the tax increases the price of those liquors it puts them more or less out of the reach of the most numerous class.

A very common and very simple means of preventing the stealing of a bank-note transmitted by post, consists in cutting it in two and sending each part separately. It would be useless to steal one half only of the note, and the difficulty of stealing both halves one after the other, is so great as to render the offence almost impossible.

Some legislators with the view of preventing offences, have endeavoured to prevent men from acquiring the knowledge necessary to commit those offences. This means of indirect legislation however

is mentioned here only to proscribe it. Such a policy tends to produce a general and brutish ignorance.

Knowledge is a necessary branch of power. Before a man can perform an act he must wish to perform it and know the means of doing so. It is demonstrable that not only the diffusion of knowledge is not hurtful on the whole to morality, but that the most advantageous mode of obviating the evil which may result from a certain amount of knowledge, is to increase that knowledge.

Some writers have supposed that men are better in a state of ignorance, and that to instruct them is only to furnish them with additional motives and means to do evil. That fanatics should have had such an idea could not be wondered at, as there must be a constant opposition between a rational knowledge and prejudices more or less absurd. But this mode of thinking is not uncommon, and the ignorance of the *golden age* is spoken of with regret. Before the error, upon which such an opinion is founded could be clearly proved, it was necessary to have a clear and precise method of estimating the evil of offences.

A crime which shows in the criminal a certain degree of knowledge and reflection, is more *odious* than a crime resulting from ignorance, because the former indicates in its author a greater depravity of moral faculties, and men are in general more influenced in their judgments by antipathy, than by calm considerations of general utility. The evil of the crime is not however solely determined by the degree of moral depravity which led to it, but depends immediately on the sufferings of those who are its victims and on the degree of general alarm produced by it.

The greatest crimes are those for which a very low degree of knowledge is sufficient, and which the most ignorant individual knows all that is required to commit. Incendiarism is worse than murder, murder worse than robbery, and robbery worse than theft. This might easily be proved by comparing the evil consequences of each offence, and it is evident that the degree of knowledge necessary to commit the most atrocious of these crimes is familiar to the most ignorant man.

Rape is worse than seduction or adultery; but rape is most common in rude and barbarous ages; seduction and adultery in more civilized times.

The diffusion of knowledge has not increased the number of offences, nor the facility of committing them, but has substituted for the means by which offences were committed, others less injurious and violent.

If a new mode of sharping be discovered by a pick-pocket, he for a time profits by his discovery, but sooner or later his secret is known, and therefore people learn how to guard themselves against it. Some new means must then be resorted to which also answers for a time and for a time only. The sooner it is generally known the better; it is true that some bad men may abuse that knowledge, but the majority will only use it for their protection.

If the good and the bad among men composed two distinct races, it might be desirable to instruct one and keep the other in ignorance. But since it is impossible to make such a distinction, you must endeavour either to enlighten all or keep from all the means of instruction. Knowledge communicated to all leaves all in the same relation to each other as they were before; imparted only to the wicked it would give them an advantage over the good which they would abuse, but the knowledge of the latter enables them to protect themselves. The most ignorant tribes have known how to poison their arrows, but only civilized nations have acquired both a general knowledge of poisons and of the antidotes which neutralize their effects.

All men may commit crimes, but only wise and enlightened men can frame laws to prevent them. The more ignorant a man is, the more disposed he is to consider his own interest as separate from that of other men. On the contrary an enlightened person cannot fail to perceive how closely his own interest is connected with the general interest of the community. History shows the most atrocious crimes to have been most frequent in ignorant and barbarous times.

Compare the state of the countries in which the government has prevented a free communication of ideas, with those where no such obstacles to the acquisition of knowledge are in existence. On one side are Spain, Portugal, Italy; on the other England, Holland and North America. Where are fewest crimes committed? Where is morality most pure? Where is the state of society most secure and desirable?

Institutions, the heads of which monopolized all knowledge, have been too much celebrated. Such were the priests of ancient Egypt, the

Brahmins of Hindoostan and the Jesuits in Paraguay. If it be admitted that the above nations were for a time kept under those rulers in a state of peace and security, it may still be asked were they happy? Can happiness exist in a state of abject servitude, with melancholy opinions, vain terrors, useless and painful obligations?

Besides, it may be remarked that these institutions obtained their sway, not so much by keeping the people in ignorance as by propagating among them errors and prejudices; and the nations thus governed have always in the end fallen victims to this narrow minded and degrading policy: kept in a constant state of inferiority by institutions opposed to all progress they have become the prey of other nations comparatively superior.

It may be said however that no one thinks at the present day of keeping men in ignorance, but that it is desirable to prevent the publication of immoral, irreligious, seditious or libellous works; that if such a publication be allowed, as soon as it takes place the evil is done, and it is too late to stop it. You may indeed punish the author and this will tend to prevent the writing of similar works in future, but this is no remedy for the evil done which you might have prevented.

In this, as in all instances, it would of course be desirable to prevent the offence from being committed at all, but this is by no means the whole question. It is not enough to think of the evil thus suppressed, it is necessary to compare it with the cost at which this suppression would be obtained, that is, with the evil of the proposed remedy. To subject the publication of every work to the previous sanction of a public officer, might no doubt prevent the printing of some pernicious books, but how many interesting and useful works might also thus be prevented from ever being published?

Where shall we find that superior intelligence, that rare genius free from error and prejudice, to be thus established as a supreme judge over the productions of the human mind? Would a Locke or a Newton have had the presumption to accept such a charge, which must in general be entrusted to ordinary men? A censor of the press is necessarily an only, interested and arbitrary, judge, whose proceedings are secret, the sentence exparte, and the judgment without appeal. Secrecy of trial, the greatest of abuses, is essential to the office. The public trial of a book would be the publication of that book, in

the course of the investigation which has for its object to decide whether it is fit to be published or not.

The evil which would result from such a procedure, cannot be appreciated since it is impossible to say how far it might not go. It is no less than the danger of stopping the progress of the human mind in every career. Every new and interesting truth must from the very fact of being new and interesting have many enemies. The invention of printing threw thousands of copyists out of employment, that of steam vehicles threatens coaches with the same fate. Galileo was thrown into a dungeon for having ventured to prove the motion of the earth round the sun. Is it to be expected that the censor will always belong to the very small number of those whose minds are above the prejudices of their times; and if even he be one of those, will he have the honesty and energy to compromise his reputation, by giving the sanction of his name to a discovery, which may at first be unpopular or turned into ridicule, and the future glory of which will belong to another? He runs no risk in *prohibiting*, while he risks every thing in *permitting*, the publication of the work submitted to him.

If it had depended on men in authority to stop the progress of the human mind, where should we now be? Religion, Legislation, Natural Philosophy, Morals would have remained in their ancient state of darkness and error. Have not men been persecuted for asserting the unity of God or the sacred rights of liberty; for teaching the true system of the heavens, and for claiming toleration and respect for all conscientious opinions?

CHAPTER III.

OF THE INDIRECT MEANS TO INFLUENCE THE WILL AND PREVENT THE INTENTION OF COMMITTING OFFENCES.

I will successively examine the chief means alluded to.

1. The first is to promote innocent amusements.

The object of promoting innocent amusements, is to save men from the danger of idleness which is the cause of so many evils, and to prevent the use of intoxicating liquors which so often leads to the commission of offences. The encouragement of a taste for agriculture, science and literature; for music, the fine arts, public assemblies, dancing, dramatic representations, athletic or other games, (not games of hazard) are means well calculated to obtain the object in view. These amusements are unobjectionable in themselves, and if sometimes they are indulged to excess, this accidental evil is not to be compared to that which it is intended to prevent.

2. To endeavour that every natural desire shall be satisfied without any evil consequences, or with as little injury as possible.

The evil which would result from the exercise of the vindictive passions, may in great measure be prevented by affording proper redress in every case of injury. If a man be left to take personal revenge for an injury he has received, he is apt to go much beyond all proper bounds; but give him what every person, not in a state of irritation, would consider as a sufficient satisfaction, and he will prefer to accept it rather than incur the penalties of the law by endeavouring to revenge himself.

If a poor man be not able to procure by his labour the means of subsistence, he is impelled by the strongest motive to the commission of any crime by which he may hope to provide for his wants. No fear of punishment can altogether restrain him who is on the point of dying from starvation, and the sad consequences of such a state can be obviated only by supplying the poor with the necessaries they are in want of.

The poor may be divided into four classes. 1st. The industrious poor who are ready to labour for their subsistence. 2nd. The indolent poor who prefer to trust to public charity than to their own exertions for their support. 3rd. The suspected poor, who having been charged with some offence have been acquitted for want of proof, but from the suspicion attached to their character are unable to procure employment. 4th. Convicted criminals without means of support who are liberated after having completed their time of imprisonment. These different classes should not be treated in the same manner, and in establishments for the support of the poor should be carefully kept separate.

Whenever a man without apparent means of support, is brought into court charged with some specific offence, he should be required to give an account of the manner in which he obtained his livelihood for the previous six months. If he has lived honestly, such an inquiry can do him no harm; if he cannot answer the question satisfactorily, precautions must be taken to secure his good conduct in future. Such precautions are particularly necessary with regard to indigent prisoners released after undergoing the punishment due to some previous offence.

Another description of offences, seduction, adultery, prostitution, may also be in some degree checked, by finding less objectionable means of procuring the satisfaction of the desires which are the cause of those offences. This may be done by encouraging marriages, at least not putting any unnecessary obstacle to them, and by permitting divorce under proper restrictions. Men are more ready to enter into a contract which may be annulled under certain contingencies, than to submit to a yoke which, however galling it may prove at a subsequent period, must be borne for life. Instead of a marriage, broken in fact though still nominally in existence, a divorce naturally leads to a real marriage. The separations without divorce, permitted in countries where marriage is indissoluble, are liable to the objection of condemning individuals to the privations of celibacy, or exposing them to illicit connections.

But although early marriages are the most likely means to check the disorders alluded to, they are not always possible nor are they in every case free from objection. Many young men, particularly in the middle and higher classes of society, attain a sufficient degree of phy-

sical maturity to participate in the disorders which it is intended to check, long before they are morally fit for matrimony. Besides many grown up men are not in a situation to undertake the support of a wife and family. This depends in some measure on artificial wants of society upon which it is difficult for the legislator to exercise much influence. The union of two persons in the bonds of matrimony, is in general considered to carry with it the necessity of a separate establishment; so that two young persons who each lived with their parents, had no house rent to pay and kept no servants, are immediately on their marriage compelled to incur additional expenses on that account, which would be avoided by their continuing to live with their parents as heretofore, until at least the birth of their first child and perhaps longer. This would in some degree obviate the above objections made to early marriages, which if made easier and less expensive would be more generally contracted.

There is however a stronger objection to early marriages and that is their effect on population. If more numerous, they would of course cause population to increase at a quicker rate than marriages contracted at a late period of life, and as it is satisfactorily established in political economy, that if the number of births increases in a greater ratio than capital, the number of deaths must be multiplied accordingly, it seems to follow that if early marriages produced too quick an increase of population, they would be attended with greater evils than those which they were intended to prevent. So here the legislator must proceed with a cautious step, and ever keep in mind that legislation is only a choice of evils. He can in fact do little to prevent the evils alluded to, beyond ensuring to the community in general a sound moral education, and endeavouring to lessen as much as possible by proper regulations the evil of the disorders which he may not find it in his power to suppress entirely.

2. To avoid furnishing encouragement to crime.

This appears such a truism as to be scarcely worth mentioning, and still many instances may be quoted where this self-evident rule has not been attended to.

If the law suffers a man, who has unjustly retained the property of another, to realize a profit by the delay involved in the recourse to a regular suit, it furnishes a direct encouragement to the repetition of the same offence.

When the object of the offence was a pecuniary profit the punishment should involve a pecuniary loss; when the offender from some vindictive feeling or enmity had only in view to cause an injury to the offended party, the satisfaction given to the latter should turn the offence into a positive benefit to him.

In engaging the services of an architect or engineer to superintend some construction, it is not unusual to allow him a certain per centage on the total expense of that construction. This is giving him a direct interest in increasing that expense. It would be far preferable to have an estimate made and to tell him: "up to that amount you will receive so much per cent; if the total expense falls short of the estimate you will have the same total amount of commission, and if it exceeds it you will have no more."

If a statesman who can influence the decision of peace or war, receives higher allowances in time of war than in time of peace, he has a direct interest in making use of his power to bring on war.

When a man insures his property against some calamity, if the value for which he insures it be greater than the real value of that property, it becomes his interest to bring about the calamity against which he took a policy of insurance, that is, to burn his house if it be insured against fire, or sink his ship if the insurance be against shipwreck. Indirect legislation cannot do much here, it belongs to the insurers to take proper precautions to guard themselves against fraud.

Should the state permit its subjects to insure the ships of the enemy in time of war? If so, the commerce of the hostile nation is facilitated, and the insurer, to save himself from loss, may give information to the enemy of the sailing or position of the ships of his own nation. The first of these two objections however is valid only if matters are so situated that the enemy could not get his ships insured elsewhere, and the second if the insurers are in a position to give to the enemy information which he could not have otherwise obtained, and if this may be done with so little risk as not to be prevented by the fear of incurring the penalties of treason. Thus the evil alluded to is doubtful. But on the contrary the advantage for the insuring nation is certain, and consists in the profit of the insurers, which is a kind of tax levied on the enemy.

4. "To diminish the influence of the temptation and increase the responsibility in proportion as the temptation increases."

This concerns more particularly public officers. A bribe which might tempt a man who receives only Fifty rupees a month, would be rejected with scorn by one whose monthly salary amounts to Five hundred. Besides, the higher the rank and allowances of a public functionary the greater his responsibility. In case of gross misconduct the loss of those allowances is a penalty he cannot escape even if he succeeds in escaping all others.

The interest of the state requires that public officers should be well paid, particularly when holding appointments which give them the power of obtaining large sums by illegal means. The greatest abuses have often resulted from an excessive economy in that respect.

5. "To render more difficult the commission of an offence."

It is only in writing that it is possible to have precise, authentic and permanent evidence; verbal transactions, unless in very simple matters, would be subject to interminable disputes. Contracts should therefore be generally written down and attested by the signature of at least two respectable witnesses. They might besides be written on a certain description of paper sold by respectable individuals appointed by Government, and on that paper might be noted the date of the sale and the name of the purchaser. This would prevent, or at least render more difficult, the falsification of the dates of engagements. Deeds of sale or mortgage, marriage deeds and some other contracts might also be required to be copied in a public register open to the inspection of all interested parties. This would not only be a precaution against the possible loss or destruction of a deed, but would prevent frauds relative to property, such as mortgaging the same estate to several individuals, the aggregate liabilities thus laid upon it being much beyond its value, &c. If all these formalities were enjoined by the law, the omission of any of them would naturally create a vehement suspicion against the deed, unless such omission was from the ignorance of the parties, or some special circumstances, satisfactorily accounted for.

The importance of registering marriages, births and deaths is evident. Besides the instruction derived from the statistical details thus obtained, registers of this description are useful to verify the authenticity of title deeds. The forgery of some pretended royal grants of free lands in India, has been proved beyond the possibility of a doubt, by ascertaining that the date they bore was either posterior or anterior

to the reign of the prince under whom they were asserted to have been given. Such means of preventing the fraudulent supposition of deeds, would not exist with regard to individuals unless public records of births and marriages are regularly kept.

Many frauds in commerce may be prevented by the establishment of standard weights and measures in every market, by publishing the price of commodities as often as possible, by having stamps and marks to attest the quantity and quality of certain commodities or the person to whom they belong.* The Government might also sometimes put individuals on their guard against certain frauds several times before successfully attempted, such as tricks of begging impostors, &c. The publicity of the Government accounts is a powerful check not only on the mere correctness of those accounts but also on the expenses of Government. Every member of the community who can read may see how much has been expended for each item and how much salary is given to each officer. Thus the accounts are fully examined and canvassed; any error in them is sure to be discovered, and no mis-application of the public funds can fail to be noticed and its authors condemned at the tribunal of public opinion.

6. Offences may also be prevented "by making it the interest of many to prevent them." Thus in some parts of India a village community is held answerable for any theft which takes place in that village.

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* Cattle stealing so common in some parts of India might be in great measure prevented by marking each head of cattle with the initial letter of the District and Thana, and a distinct number which would be registered in the Thana with the name of the proprietor to whom a copy of that inscription would be given, which, in case he sold his cow or bullock, he would deliver with it to the purchaser. Supposing a bullock thus marked to be stolen, not only the thief not having the title deed would find it difficult to dispose of it, but he could not even keep the bullock in his possession without danger, the rightful proprietor having given information at the Thana and the Thanadar having immediately circulated the same through his and the neighbouring districts, so that any common Burkundaz seeing the bullock, would from its mark know it at once. By having separate registers for bullocks and cows, and beginning anew the series of numbers after 4 or 5 years, it would probably not be necessary to carry it further than four figures, or 9 9 9 9.

7. "By facilitating the means of recognizing individuals." It is not uncommon among English sailors to have their family and Christian names painted on their arm in indelible characters. If such a custom could become universal it would add to the efficiency of the laws, and become an almost infallible remedy against many offences, particularly against all kinds of fraud where a certain degree of self-confidence is necessary. The wearing of coats of a certain colour and shape, as for instance the uniform of soldiers, belongs to this head.*

8. "By diminishing the uncertainty of procedure and punishments."

Has a crime been really committed? It is important for society that the Magistrate should be informed of the same, should ascertain who is the criminal and inflict a proper punishment upon him. Is it *asserted* that a crime has been committed? It is desirable without delay to verify the truth or falsehood of that assertion. Thus the rules of evidence and forms of procedure should be such as to admit all true and exclude all false information.

All precautions not absolutely necessary for the protection of innocence furnish a dangerous protection to crime. The difficulty and expense of prosecutions tend to prevent them and consequently to weaken the influence of the courts of justice. However simple the system of procedure may be the obligation to prosecute is still a hardship imposed on the offended party, and it would be much better to entrust a public officer with the duty of prosecuting all those who may, on good and sufficient grounds, be charged with offences against society.

9. "By prohibiting acts accessory to offences."

Acts which are related as cause and effect to pernicious actions may be considered as accessory offences. Thus the selling of poisons, and carrying of secret weapons have been prohibited in some countries. The policy of this latter prohibition is doubtful, as those weapons may serve for self defence as well as for attack, and, instead of prohibiting them, the permission to carry them might be subjected to some conditions calculated to prevent their being abused.

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* So do "passports" too, the advantage of which however is probably not equal to the evil of the annoyance they occasion.

Some accessory offences are only considered as such because they are likely to facilitate crimes; such is the sale of poisons. Others dispose the individual to the commission of offences; such are gambling, idleness, cruelty to animals, &c. Others imply an intention of committing an offence. A soldier in a review puts a ball into his musket but is discovered before he fires it off: if this act was not a mere oversight it may be taken as proof of an intention to commit murder. According to the English law it is an offence to have in one's possession stolen goods without being able to give an account of the mode of acquiring them, because it is considered as a proof of being an accomplice of the thief. To erase marks on shipwrecked goods is also an offence because it is held to denote an intention of illegally appropriating them.

CHAPTER IV.

OF EDUCATION.

THE *analogy* between the government of a family and that of a nation is striking; the *difference* between the two is not so obvious and it may be desirable to point it out.

1. The domestic government must be more active, more watchful, go more into particulars than the civil government. The civil authority cannot do better generally than to trust to the prudence of individuals for the management of their personal interests, which they understand much better than the government can do. The head of a family must on the contrary constantly watch and assist the inexperience of those who are under his charge.

2. This continual exercise of power which would be subject to so much abuse in the state is much less so in the family. Parents have for their children an affection much greater than that of the civil magistrate for those who are subject to his authority.

3. Besides, parents know the disposition and abilities of their children and may make use of punishments where the magistrate could not do so. The latter must act according to certain rules, and cannot exactly adapt his treatment of individuals to the abilities and dispositions of each. If a child pretends ignorance in excuse of a fault, the father will generally know whether that plea is true or not; the magistrate would seldom be able to make such a distinction.

4. These two governments differ chiefly by their power of rewarding. All the amusements of children, and even the satisfaction of their wants, may assume the shape of rewards from the manner of allowing them on such and such conditions, or on the performance of a given task. No government is rich enough to obtain much by rewards alone; no father is so poor as not to have an inexhaustible fund of rewards at his disposal.

If we consider education chiefly as a means of preventing offences a thorough reform is necessary. The most neglected class must be the

chief object of our care. The more incapable parents are to fulfil that duty, the more careful the government must be to do so for them. Not only orphans left in poverty, but also children whose parents from extreme indigence or bad conduct no longer deserve the confidence of the law for such an important charge, should be carefully looked after. These classes too much neglected in most states produce the great majority of offenders.

Experience has demonstrated that news-papers are one of the most efficient means to direct public opinion, dissipate false rumours, allay discontent, and prevent abuses of authority. In those papers instruction both descends from the government to the people and ascends from the people to the government.

Their utility, their importance, the influence they exert on public opinion, are in proportion to the independence which they are supposed to enjoy.

The chief instruction the government is bound to give to the people is that which is relative to the knowledge of the laws. How can it be expected that the laws will be obeyed if they are not known? How can they be known if they are not published in the simplest form, so that each individual be able to find by himself all that is necessary to regulate his conduct?

A legislator might influence public opinion in preparing a code of morals on the same plan as the legislative code. The most delicate questions relative to each profession might be cleared up in that book. It should not be limited to cold maxims: by including in it historical anecdotes well selected, it might be made an interesting manual for persons of every age.

To prepare such a moral code would be as it were dictating to the public the judgments which it ought to pronounce on various questions of morals and politics. To this code might be added, as a supplement, a collection of popular prejudices with remarks and reasonings which might act as their antidotes.

CHAPTER V.

CULTIVATION OF THE FEELINGS OF BENEVOLENCE, HONOUR AND RELIGION.

If the feeling of benevolence may be increased by cultivation, as there is no reason to doubt, it is chiefly with the assistance of another principle of the human heart, the love of reputation. When a moralist represents benevolence under the most pleasing colours, and holds up selfishness and inhumanity with their repulsive features, what is his object? He endeavours to connect the pure social principle of benevolence with that of duty and with the half social principle of the love of reputation, and to strengthen one by means of the other.

To increase the sentiment of benevolence and to regulate its application according to the principle of utility are two important objects of the legislator.

Is the legislator desirous of promoting a spirit of humanity among his fellow citizens? He must give them the example, not only by showing the most tender regard for human life, but also by a proper attention to all circumstances which influence sensibility. Cruel laws have a tendency to render men cruel either from fear, from imitation, or from revenge.

The legislator must prohibit all acts which tend to produce a spirit of inhumanity. The barbarous shows of gladiators which were introduced in Rome in the latter times of the Republic, no doubt greatly contributed to give to the Romans the ferocity which they displayed in their civil wars. Can a people who have been in the habit of sporting with human life in their amusements, be expected to have any respect for it when their passions are excited?

On this account also every kind of cruelty to animals should be prohibited. Cock-fighting, bull-baiting and other cruel amusements, obtained at the expense of the most dreadful sufferings of sensible beings, prove either a want of reflection or a want of humanity in those

who derive enjoyment from them. Animals may be put to death but they should not be subjected to any unnecessary pain. Men have begun to sympathize with slaves, a time will come when the sufferings of animals will also excite general feelings of sympathy. The English government has given in both respects examples which deserve to be imitated by other nations.

If an act of humanity or benevolence be turned into a jest, or an act of cruelty spoken lightly of, unless this should excite the contempt or disgust of those to whom the unfeeling remark is addressed, it may be considered as a first step towards the destruction of some of the most amiable feelings of human nature.

The greatest enemy to general benevolence is the spirit of exclusive doctrines, which produce intolerance, and represent all the followers of other religions as infidels, enemies to God, doomed for their unbelief to eternal punishments.

The sentiments of benevolence do not always agree with the principle of utility, they can only be regulated by instruction. They are not to be commanded and compelled, but they may be persuaded and enlightened. Men may be taught to distinguish the different degrees of utility and to proportion their approbation to each. The regulating principle of true morality is well laid down by Fenelon in these words characteristic of his heart. "I prefer my family to myself, my country to my family, and mankind to my country."

Men should be made to feel shame for an exclusive family spirit which would sacrifice every thing to the prosperity of that family, and for that blind love of country which leads to the hatred of other nations. They should be taught the folly of considering it an act of humanity to favour the escape of a criminal, to procure impunity to crime, to encourage beggary at the expense of industry, &c. &c.

As men grow more enlightened their benevolence becomes more general because they perceive how the interests of all are connected together. Ignorant nations trading with each other, have treated their neighbours as rivals upon whose ruin alone their own prosperity could be safely established. Adam Smith's Treatise of Political Economy is in this respect a treatise of universal benevolence, because it proves that commerce is equally advantageous to all countries, that each obtains from it benefits suited to its peculiar situation, and that

nations are *partners* rather than *rivals* in the trade they carry on with each other.

2. There are several ways of increasing the power of opinion such as: the liberty of the press; publicity of all acts interesting to the nation; publicity of the courts; publicity of state accounts and deliberations which do not for special considerations require to be kept secret. An enlightened public which is the guardian of personal honour, and the administrator of the moral sanction, forms a supreme tribunal which judges all causes and persons.

There is an art of governing public opinion or taking advantage of it to obtain the object in view. Here is a remarkable instance. In Spain a prohibition was issued by the police against the wearing of large brimmed hats, which, worn with a cloak, were found to disguise a person most completely, and thus wrapped up a murderer or a thief committed a crime and escaped discovery. The proscribed hats, however, were generally worn, and the prohibition met with so much opposition that it was necessary to rescind it. A short time afterwards Count Arunda, having become Prime Minister, ordered all the public executioners throughout Spain to wear hats with large brims, and within a few weeks of the issuing of that order the hats in question were no longer worn by any but the above officers.

Sometimes a simple change of name is sufficient to produce a change of opinion. The Romans abhorred the name of a King, but they did not bear such a strong hatred to that of a Dictator or an Emperor, and Augustus never assumed the royal title. Cromwell would probably not have been allowed to reign as King of England, but he had under the name of Protector a more extensive authority than that of Kings.

The most powerful means of producing an important change in public opinion is to astonish the public mind by some great example. Thus Peter the Great in going himself through every grade in the army taught his nobles to submit to the yoke of military discipline. Catherine the Second conquered the popular prejudice against inoculation, not by trying the experiment on criminals as Queen Anne had done before her, but by subjecting herself to it.

3. The cultivation of the religious spirit has two objects; to increase it and to give it a proper direction. If the direction be bad it is clear that the weaker the sanction the better. Thus as regards re-

ligion the first thing for the legislator to examine is its direction; the means of increasing its influence is of secondary importance.

Its direction should be consistent with the principle of utility. Its sanctions, that is, its rewards and punishments should be attached, the former to acts tending to the happiness of society and to no other, and the latter to actions hurtful to society and to such exclusively. The only manner of judging its direction is to consider it solely with regard to the advantage of the political society. Whatever is beyond that is as regards the legislator a matter of indifference.

But when a man has formed his opinion, it is not in the power of legal penalties to make him change it. All that laws and penalties can do will not compel a man *to believe*, but merely make him *declare* that he believes.

Those who from conviction or honour refuse to make the required declaration undergo the penalty, that is, are persecuted. Their sufferings, far from having a tendency to persuade them, rather tends to confirm them in their opinion, partly because the use of such violent means is a tacit acknowledgement of a want of better reasons to bring forward, and partly because such a tyranny produces an aversion to the opinions which it is thus attempted to force on the conscience of individuals.

Those who with less energy escape the penalty by a false declaration do so at the expense of their conscience, and incur thereby the public contempt which follows these hypocritical retractations. Thus a portion of the community has to accustom itself to the contempt of the other to be in peace with itself. Men exert themselves in making fine distinctions between innocent and criminal falsehood; some deviations from the truth become privileged as being a protection against tyranny; a perjury or a false signature under peculiar circumstances, comes to be considered as a simple form free from any guilt. In the midst of these immoral quibblings a religious respect for truth no longer exists, the limits between right and wrong are confounded, the moral sanction is weakened and corrupted. Thus the legislator who requires declarations of faith depraves the nation. He sacrifices virtue to religion forgetting that religion itself is good only as the supporter of virtue.

No doubt those who had no very decided opinion on the subject in dispute may adopt the newly proclaimed opinion, at first as a matter

of prudence, and afterwards may end by believing it. In such matters arguments which tend to favor the interest of a man, make more impression upon him than those in which he perceives an opposite tendency, but if however fear enters at all in the conviction the mind is never at rest. What is believed one day is doubted the next. A clear and moral truth cannot be shaken, but the belief of a religious dogma is not so firm. Thence arises the impatient dislike of those who attack it. Examination and discussion are an object of fear because the faith in the disputed propositions is not established on firm grounds. The understanding is weakened, the mind looks for complete rest in a blind credulity, eagerly seizes upon all errors which have some connection with those already adopted, and is afraid of frankly examining the limits of the possible. All that supports sophistry, or opposes human reason and tends to show the errors to which it is liable, is welcome to such a diseased mind. A disposition is acquired to reject evidence, prefer to it half proofs, and subtilize against common sense. Thus all penal means used to increase the influence of the religious sanction, act indirectly against that essential part of Morals which consists in respect for truth and public opinion. All enlightened friends of religion know this well, but there are few countries where the legislator has fully acted on that principle. Violent persecutions have ceased, but indirect persecutions and political incapacities show how precarious is still the toleration of dissenting sects.

It is not to be denied that religion has had but too great a share in the calamities of nations, but its tendency is gradually to disengage itself from vain and pernicious dogmas and to furnish an efficient support to sound morality. This is not the place to examine all the services which religion may render, as a species of moral teaching better adapted than any other to the most numerous class of society, as affording consolations for the evils inseparable from humanity, and as a means of exciting the feeling of benevolence, and of producing acts of self devotion which no other motives perhaps could inspire.

The chief use of religion with regard to civil and penal legislation, is to add solemnity to an oath, and to render more efficient this means of insuring the correctness of human evidence.

The sanction of an oath, considered independently of legal penalties, rests on two principles, one religious and the other moral. The same form of solemn declaration which in case of perjury professes to

expose a man to eternal misery, exposes him at the same time to the contempt of men. The religious principle is the more apparent of the two, but the moral one has in reality the greater influence. The influence of the former is partial and that of the latter universal. It would be injudicious to neglect either but particularly the latter.

When public opinion does not lend its support to the sanction of an oath, that oath is often found to have no power at all. Such are oaths taken at the Custom House or required from the scholars of some Universities.

The power of an oath is necessarily weakened when it is taken with reference to articles of faith or to opinions, because in such a case to prove that a man has perjured himself is impossible. Besides, our reason, always in some degree uncertain, is subject to alterations of opinion which do not allow of taking in this respect engagements for the future. How can I know that my present conviction will be the same ten years hence? All oaths of this kind are privileges given to the unscrupulous against those whose conscience is more tender.

To show how much habit can corrupt moral opinions, it may be interesting to quote here a passage from a work on education by Lord Kaimes, Judge of the Court of Sessions in Scotland.

"The oaths of the Custom House," says the learned author, "are "now counted for nothing. Not that men have become more immo-"ral, but because no one attaches any importance to them. The du-"ties on French wines are the same in Scotland and in England, but "as we are not rich enough to pay them, a tacit permission to pay for "French wines the duty fixed on wines imported from Spain, has been "found more advantageous to the revenue than the strict letter of the "law. It is however necessary to swear that those French wines are "Spanish wines, so as to be permitted to import them on paying the "duty fixed on the latter. Such oaths were originally criminal be-"cause they were frauds against the public, but now that they are "mere forms and imply no faith given or received, it is a mere man-"ner of speaking like those compliments of common civility, '*Your* "*most humble servant*,' &c. In fact we see merchants who live on "these oaths and who are notwithstanding trusted in the most impor-"tant affairs."*

* This is not Lord Kaimes's actual text, the original work not being at hand, it is the translation of the French version in Dumont's work.

CHAPTER VI.

GENERAL PRECAUTIONS AGAINST ABUSES OF AUTHORITY.

THE following is not a complete enumeration of the indirect means to prevent the misconduct, incapacity or dishonesty of those who are entrusted with public authority; the object of this chapter is only to direct attention towards this branch of legislation. The chief means alluded to are:

1. "To divide power into different branches."

A division of power is an improvement suggested by experience. The plan which appears most natural and which first occurs to the mind is to place all power in the hands of one. Among Oriental nations the form of Government has continued to be regulated on this principle. The despotic power descends among them from the hands of the King to those of the lowest magisterial officer. The advantage of a division of power is not only that each officer is a check on the other, the Judge on the Magistrate, the Magistrate on the Judge, but each applying his undivided attention to one kind of duty performs it with more efficiency. Over all these separate powers dependent on each other, there must of course be a superior one which has no other check but the rules it imposes on itself.

2. "To divide the different branches of power among several persons."

The chief advantages of this division, resorted to in Courts composed of several Judges, in Councils or Boards consisting of several members, are these.

It diminishes: 1st. the danger of precipitation or personal prejudice; 2dly. that of ignorance; 3dly. that of dishonesty.

The division of powers leads however to great delays in the transaction of business, but this evil may be partly obviated by regulating the division alluded to, according to the necessity of greater deliberation or greater energy and despatch in the special duties to which it is applied. The legislative and the military powers are in this respect

the two extremes; the former requiring the greatest deliberation and the latter the greatest despatch.

The chief danger however of plurality of persons in a court or in an administrative council, is the diminution of personal responsibility, which results therefrom. A numerous body may reckon on exercising a great influence on the public, and may venture to commit an injustice which one man would not dare to attempt. None of the members in particular bears the blame of an odious measure; one member throws the fault on the other and the more numerous the assembly the less is the influence of public opinion over it. The members form among themselves a kind of separate community whose approbation is preferred to that of the public, and which protects by its praise and influence those who may have incurred the public hatred in its service.

In all cases, which do not as legislation require a collection of talents and knowledge, it seems preferable to entrust each kind of power to the hands of one man. Upon him is thus fixed the whole weight of moral and legal responsibility. He shares with no one the honour of his acts and bears all the blame which they may deserve. He is alone against all, having no other support but his integrity and the public esteem.

This besides is the best means of discovering the real abilities of individuals. A man without talent, may long remain hidden in the crowd among the members of a numerous body before his incapacity be discovered, whereas it would have appeared immediately if he had been placed alone in a situation of responsibility.

The advantages of unity and division of power, are in great measure combined in a Board or Court of justice, where the members have each in the generality of cases an independent authority, where each for instance, can confirm the order of a subordinate officer but the concurrence of two members at least, or of a majority, is required to cancel it, and where each case may under special circumstances be called in to be examined and decided upon in a full court, each member separately recording his opinion. The same object of combining advantages of unity and division of power, is answered in an administrative council, by giving to the President the right of acting on his own authority even in opposition to the majority of the Council. Bound, under ordinary circumstances, not to act without consulting

the Council, each member may record his opinion, but the President is not under the necessity of conforming his conduct to those opinions. In cases of urgency he may act without any previous consultation with his Council, but must as soon afterwards as practicable place his conduct before them that they may record their remarks upon it.

3 "To place the power of *appointing*, and that of *removing* a public officer, into different hands."

The pride of a man is interested in not condemning his own choice. It is not rare to see public officers disregarding all complaints, shutting their eyes to the clearest proofs against a favourite subordinate whom they have appointed to his present situation, and whom they cannot be made to believe unworthy of it.

In popular elections the share of patronage which belongs to each is so small that the illusion above alluded to cannot exist.

In England the choice of Ministers belongs to the King; but the parliament may in reality remove them by a majority of votes against them. This however is but an indirect application of the principle here under consideration.

4. "Not to allow Governors to remain long in the same appointment."

This principle is particularly applicable to some considerable provinces remote from the mother country.

A Governor armed with very extensive powers may, if time be allowed him, labour to establish his independence. The longer he remains in his appointment, the better his opportunity to strengthen himself by creating a party or joining one of the parties already in existence. Hence oppression to one and partiality to the other. Besides this, he may greatly abuse his authority without any one daring to bring forward a complaint against it. The duration of his power excites fears and hopes which tend to make every one submit to him.

The disadvantage of frequent changes is that they remove a man from his appointment just when, from the experience he has acquired, he is best qualified for it. This objection however is partly obviated by the institution of a subordinate and permanent Council which keeps up the routine of the administration.

5 "To renew the governing bodies by rotation."

or less impeaching the judgment or honesty of its author, and this is the chief reason of the liberty of the press being as rare as it is obviously advantageous.

If from the form of the government, or from special circumstances, the Sovereign could not allow the public criticism of his administration, he might at least permit that of the laws. If he claims the privilege of infallibility for himself he needs not do so for his predecessors or his subordinates. If the liberty of the press be liable to objections which apply only to papers or pamphlets addressed to the ignorant as well as to the educated part of a nation, it cannot be so for larger works on serious subjects which are only fit for a comparatively small class of readers, and the effect of which is not so immediate as not to allow time to obviate it by a refutation.

9. "To publish the reasons and facts upon which the laws or other measures of Government are founded."

Why should the Government refuse to explain the reasons of its conduct in all important cases? If those reasons be good, they can only tend to secure a general approbation to the line of conduct in support of which they are stated, and to render the nation more attached to its Government.

In some branches of administration it would be useless and might be objectionable to publish before hand the reasons which determine the adoption of active measures. It is thus necessary to distinguish the cases in which it may be desirable to enlighten public opinion, when otherwise it would probably fall into error, but with regard to legislation the principle alluded to is always applicable. What is a good law but a law for which a good reason may be given?

10. "To regulate the exercise of public authority by rules and formalities."

The laws which regulate the exercise of public authority may be distinguished into two classes: in the first are those which state the causes for which such and such a power is brought into action; in the second are the laws which determine the forms according to which that power must be exercised. All these causes and forms should be specified in the code, and the members of the community warned that such are the only causes for which their security, liberty, property, and their honour are amenable to the administration of the law.

11. "To establish the right of association among the members of the community, for the purpose of meeting together and expressing their opinions on the measures of Government."

Those associations are of course subject to the laws. If any of their members commit the slightest violence let them be punished like any other individuals. If you feel that you are not strong enough to punish them, it is a proof that the association has acquired an influence which it could not have obtained without some good reason. If it be an evil it is a necessary evil. If no counter-associations have been found to support you, if with all the regular power of Government in your hands the number of your opponents is such as to intimidate you, cannot this be taken as a proof that the deliberate judgment of the nation is against its Government? No doubt the majority of a nation may be in error, but when it is on one side and the Government only on the other, is it not natural to infer from this that the general discontent must proceed from some just cause?

Far from being a cause of insurrection associations are a powerful means of obviating that evil. Insurrections are the convulsions of weakness to which despair supplies a momentary strength. They are the efforts of men who either are not allowed to express their opinions, or whose projects cannot succeed if generally known. Plots opposed to the general feeling of the community can succeed only by surprise and violence. Why should those who can hope to triumph by an appeal to public opinion resort to more dangerous and objectionable means? Men who are allowed to associate under the protection of the law will not have recourse to rebellion, except in those rare and unfortunate cases when the Government must be at any risk resettled on a more proper basis, and rebellion has become necessary for this whether associations be permitted or not.

Associations might probably be permitted in the most absolute Governments. Those kinds of states are more tormented than others by sudden convulsions, and associations would prevent those disorders. If the subjects of the Roman Empire had been in the habit of forming associations, the empire and the life of the reigning Emperor would not have been so often put up to auction by the Prætorian guards.

There may however be a degree of ignorance in the people which would render associations dangerous, but this proves that ignorance is

a great evil and not that associations are not a great good. Besides, this practice becomes an antidote to itself. As an association gains in extent under the protection of the law, all its principles are discussed and the public mind is enlightened. To this happy result the Government which disposes of all the means to spread an accurate knowledge of facts, and to dissipate errors, may powerfully contribute. Thus liberty and instruction go hand in hand: the progress of instruction checks the errors of liberty.

CHAPTER VII.

CONCLUSION.

THE general result of the principles which have been laid down with regard to penal legislation, presents a happy prospect and induces a confident hope of greatly diminishing crimes and the evils which follow from them. The great point is: 1st. to reduce, as much as possible, the evil of offences to be such as may be cured by a pecuniary compensation; 2dly. to throw the burden of that compensation on offenders.

The evil of offences proceeding from incontinence or enmity is often such as cannot be compensated by money. In many cases however, although the pecuniary compensation cannot altogether remove the evil, it will materially extenuate it. It cannot repair a broken limb or restore a father to his family, but it will give a certain portion of good to balance a portion of evil, and thus as far as practicable square the account.

But the most fruitful source of offences is *rapacity*. This is the enemy against which it is necessary constantly to guard, and this requires a peculiar system of tactics the principles of which have been too often disregarded.

Be indulgent for that passion so long as it attacks you only by peaceful means; but be careful, however, ever to deprive it of any unjust profit it may have made. Let your severity increase in proportion as the passion alluded to resorts to threats or violence, murder and incendiarism. It is in these gradations that the art of penal legislation consists.

All evil that may be repaired is nothing. An injury which may be exactly compensated by a pecuniary indemnity, is soon forgotten and as if it had never taken place; from the moment the injured individual gets a full compensation for the injury he had suffered, all alarm ceases.

It would be extremely desirable in every instance, that these com-

pensations should be given at the expense of the mass of offenders, that is, either from their actual property or from the produce of the labour imposed upon them. Thus security would be inseparably connected with innocence, while anxiety and loss would fall to the share of the disturbers of the social order. This is the point of perfection at which we must aim, although we cannot hope to attain it till after a long experience and repeated attempts.

When this means is insufficient, the compensation should be taken from the public treasury, or from Insurance Companies supported by the public.

The imperfection of the laws in this respect is striking. A crime has been committed: those who have suffered either in their persons or fortune are abandoned to their unhappy fate. Why should not the community of which they are a part, and which has failed to protect them, give them an indemnity for the inefficiency of its protection?

If an individual has prosecuted an offender at his own expense, even in his own cause, he is no less the defender of the state than the man who fights against external enemies; the losses he suffers in defence of the public should be made good to him at the expense of the public.

To admit this is merely to carry the principle of Insurance into such cases. The additional expense it will involve must be provided for by additional taxes, but each individual by the payment of a very trifling amount, will thus be secured as much as possible against the hardship of being required to prosecute an offender at his own risk.

If an innocent man has suffered from an error of the courts, if he has been held up to suspicion, subjected to a long imprisonment and the anxiety of a solemn trial, is it not obviously due to justice to afford him some compensation for the wrongs he has endured? Can the community claim the privilege of not doing justice to those it may injure through the errors of its officers?

It would be desirable for the happiness of society, that all sudden and unforeseen losses which may fall on individuals without any fault of theirs, should be made good to them at the public expense. This would constitute an Insurance Company against all evils of any kind to which human beings are subject.

The general result of this work may be here stated in a few words. *Good laws may reduce nearly all crimes, to acts the evil of which may be compensated by a pecuniary indemnity, and in this case, by a well organized system of compensation, the evil of offences ceases almost entirely.*

END OF THE PRINCIPLES OF THE PENAL CODE.

IV.

PRINCIPLES

OF THE

CODE OF PROCEDURE.

PRINCIPLES OF THE CODE OF PROCEDURE.

BOOK I.—GENERAL REMARKS ON PROCEDRUE.

CHAPTER I.

INTRODUCTION.

After the laws, which establish the rights and obligations of men with regard to each other, have been enacted, the legislator has not yet completed his task. Other laws are necessary to regulate the mode in which the observance of the former shall be enforced. These are the laws of procedure.

When a private individual applies to the Judge for redress, the judgment he solicits, has reference either to a point of fact or a point of law. If the question to be determined consists of a point of fact, an inquiry is necessary to ascertain whether the assumed fact be true or not, and the decision can only be based on evidence. If the question relates to a point of law, it becomes necessary to determine what the law orders on the subject.

A right disputed or a right violated, constitute all the cases to which the operations of a Court of Justice have reference. In the former case nothing is wanted in general but a *decision* in favour of one of the parties. In the latter, it will most frequently be sufficient to put an end to the evil and afford a compensation to the sufferer, but sometimes, in addition to this, it will be necessary to punish the offender.

As regards disputed rights, all cases resolve themselves into this. A affirms, and B denies; A says, This is my right. B replies, This is not your right; it is mine.

The first thing to be done is to ask A to prove his claim, that is, to show how he has acquired the right which he asserts to be his, or, in other words, to establish some fact on which the legislator has

grounded the existence of the right in question. "I have a right to this house," he will say, "because I have *inherited*, or because I have *purchased*, it."

After this affirmation of the existence of a legal fact, what will be the reply of the Defendant? He may admit the fact and acknowledge that the right alluded to has existed, but he may urge that, subsequently, another fact took place which, according to the law, puts an end to the right of the Plaintiff. "This house was purchased by you, but you have since alienated it;" or, "you took possession of this house as legatee of the late proprietor, but this was done under a will which I contend is irregular and invalid, and I, the next of kin, have a right to the house as legal heir to the late proprietor."

It may be that B will meet A's allegations by a flat denial, or by denying that the right claimed ever existed in consequence of the fact established by A. He may say: "The purchase you mention was illegal, the house did not belong to the person who sold it to you;" or, "you claim this house as part of your paternal inheritance, but it did not belong to your father at the time of his death."

If the law has clearly and completely determined all the events upon which the acquisition or cessation of a right depends, the matter of every suit is reduced to positive elements, and consists merely in the discussion, proof, or confutation of a *fact*.

When the Judge has received the statements of both parties, if those statements contradict each other, proofs are required to determine the question. A endeavours to prove the contested fact and B to disprove it. After examination of the evidence on both sides, the judge delivers his judgment.

Such is the procedure in a civil suit: in a criminal trial it is essentially the same as soon as the supposed offender has been arrested.

Is a man charged with having committed an offence? He can only choose between two plans of defence; 1st, he may simply deny the fact and then comes the examination of the evidence; 2dly, he may admit the fact but deny that the act in question is criminal. He may acknowledge, for instance, that he took the horse away from a field where it was grazing, but he will affirm that he had purchased it, or it had been given to him, &c. He may not deny that he has wounded the plaintiff, but he will affirm that he did it in self-defence, or that he wounded him only by accident. Then again comes the

production of the evidence, which does not in its nature differ from what it would be in a civil case, and the judge absolves or condemns.

Thus, in a civil as in a criminal suit, the matter at issue consists of *facts*, but of *facts* of a different nature. In a civil suit the point of law merely refers to the existence or non-existence of a fact, to which the law has attached the acquisition or cessation of a right; in a criminal case, the legal question consists in determining whether the imputed fact be real, and whether it be one of those to which the law has attached a certain penalty. In a Civil case the point of law may consist in this: Can an adulterine son be adopted or not? The fact here to be determined is the intention of the legislator as expressed in the text of the law. In a Criminal trial the legal question may be: Is such a writing a Libel? The fact to be decided in this instance, consists in ascertaining whether the writing alluded to answers to the legal definition of a Libel.

CHAPTER II.

OBJECTS OF THE CODE OF PROCEDURE.

THE ultimate end of a Code of procedure, as of all other laws, is Security. Subordinate to this, its special objects are: 1st, to insure right decisions; 2d, to avoid delay, expense, and all unnecessary difficulties in obtaining a judgment.

By *right decisions* should be understood decisions in conformity with the law of the land. The fears and hopes of every member of the community are grounded on the law. If the judgment of a Court of justice be in accordance with the expectations thus formed, the public is satisfied; if, on the contrary, the general expectation be disappointed, some degree of alarm is immediately felt.

If a rule of procedure tends to make the judge give a decision in contradiction to the spirit of the law and his own conviction, for instance, to acquit a prisoner whom he believes to be guilty, or to deprive a citizen of a right which he feels that the law intended him to enjoy, it may be safely concluded that such a rule is not calculated to secure right decisions.

The above should not however be understood as implying that all technical forms must be dispensed with, and that the will of the judge should be the only rule of his decisions, but only that all such forms ought to be avoided which put the judge under the necessity of deciding against what he believes to be the truth, and thus place a technical rule in opposition to the first object of a rational and just system of procedure. We shall see further the precautions which it is desirable to take, to obtain trustworthy evidence and conscientious judgments.

2. The importance of the second object of the code in question, viz. to avoid all unnecessary delay, expense, and other difficulties, is obvious; but to frame the rules of procedure and carry them into execution so as to answer fully that object, is a task which requires from the legislator extraordinary ability and firmness. It is no exag-

geration to say, that, generally, the rules of procedure appear as if they had been intended to multiply the difficulties, and increase the expense, of obtaining redress through the Courts of justice.

What is the course followed by a man of common sense, if a dispute arises between two of his servants or two of his children? He does not recommend each party to consult with a friend, much less with a man interested in fomenting the quarrel, and then give a statement of his case in writing. He immediately calls both parties before him and cross-examines them; requiring answers to all his questions even when unfavourable to the party under examination. He considers a refusal to answer as a confession of guilt, unless he perceives some peculiar motives which may induce even the innocent to decline answering. Every witness is heard, the domestic judge reserving to himself the right of appreciating each testimony at its proper value; he does not judge of the evidence from the number, but from the respectability and trust-worthiness of the witnesses. He permits each of them to tell his story in his own way. If one contradicts the other, he immediately confronts them, and gathers the truth from the contradictory assertions and the tone and manner in which they are made. He endeavours to arrive at a prompt conclusion, so as quickly to put an end to all dissensions in his family; and as *recent* facts are more easily known and proved, he allows of no postponement of the trial except for special and sufficient reasons.

Such is the system of domestic procedure, to which the procedure of the Courts often offers a striking contrast. The comparison of legal and domestic procedure must not however be carried too far: there are essential differences. The difficulties of ascertaining facts, obtaining witnesses and securing offenders, are much greater in the state than in the family. Besides, a public Judge is not like a father; it is not enough that he should be satisfied of the correctness of his own decisions, they must be such as to appear also satisfactory to others. Courts therefore must be surrounded with checks which are not necessary in a private family. Those checks are publicity and appeals.

CHAPTER III.

OF PROOFS AND EVIDENCE.

WHAT is a *proof?* In the most extensive sense which may be given to this word, a proof is a well ascertained fact which is considered as a reason to believe the existence of another fact. A sportsman finds certain marks on the ground, or his dogs utter a peculiar cry, and he from these facts immediately infers that the game he pursues has passed in that place.

In common acceptation the word *evidence* has reference chiefly to the practice of judicial Courts, where proofs and counter-proofs are brought forward by men accustomed to dialectics, and are sifted, compared, weighed, by other men who should be as great in wisdom as they are in dignity, and who after an impartial examination deliver their judgment.

There are different kinds of evidence. *Personal* evidence is given by a witness and *real* evidence furnished by some particular *thing*. Paul deposes that he has seen John threatening Joseph and running after him. Joseph has been killed and John's knife covered with blood has been found near the corpse. Paul's testimony is *personal* evidence; the knife supplies what is called *real* evidence.

A *direct* proof is that which applies to the principal act without any thing intermediate. Paul has seen John commit the murder; here the evidence is *direct;* in the case above quoted where he only saw him run after Joseph, the proof was *indirect* or *circumstantial*, that is, it only furnished a presumption that the murder which subsequently took place was committed by him.

A robbery has been effected in A.'s house; the same night his servant has run away. This flight is an *indirect* or *circumstantial* proof against the servant, and produces a suspicion, more or less strong, that he was concerned in the robbery.

All *real* proofs are *circumstantial*.

The evidence may consist in documents, which may either have

been written without any reference to the case in question, as some letter or note where the fact to be proved is incidentally mentioned, or indirectly implied; or in documents which may have been prepared according to some legal form, to be used eventually as evidence in a Court of justice: such are Contracts, Bonds, Deeds of sale, &c. Documents of this kind constitute *Pre-established* Proofs.

Borrowed Proofs are proofs taken from some previous case tried in a Court of justice, from depositions there given, &c.

The evidence of a witness is *original* when he speaks from his own knowledge of the fact in dispute, and only deposes to what he saw or heard at the time and place alluded to. His evidence is *non-original*, when he speaks only of what he heard from another person, supposed to have been present at the time or place in question.

The same distinction applies to documents, which may be brought forward in original or only in copies.

Perfect proofs are those which, taken by themselves, do not appear liable to any particular objection, as when a man of character and ordinary intelligence, swears distinctly to a fact with regard to which he cannot have been mistaken. Evidence of this description leaves no doubt on the mind. Proofs are called *imperfect*, when, either from the suspicious character, or want of intelligence, of the witness, or some other cause, they do not produce the same degree of conviction as *perfect* proofs.

The above divisions include all kinds of evidence, which in general constitute only two very distinct classes, viz. *direct* or *indirect* evidence. The first class includes the *original* evidence of a witness and *pre-established* proofs; the second consist of *real*, *circumstantial*, and *non-original* proofs.*

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* See for further details with regard to evidence, Book II. Chapter I., &c.

CHAPTER IV.

1. OF THE TRUTH AND FALSEHOOD OF HUMAN TESTIMONY.—2. OF THE CHECKS RESULTING FROM THE NATURAL, MORAL, RELIGIOUS AND LEGAL SANCTIONS.

1. We are generally, either from natural instinct or from association of ideas, disposed to trust to human testimony, but there are instances however in which we find it impossible to do so. This is particularly the case:

1st. "When the evidence of the witness is from any personal cause liable to suspicion."

2ndly. "When the evidence of some of the witnesses is directly opposed to that of others." If the evidence be equal on both sides it is impossible to come to a conclusion; if it be stronger on one side, the counter-evidence only weakens the belief which might otherwise be entertained, but does not destroy it altogether.

3rdly. "When the facts stated are improbable." Facts contrary to the ordinary course of nature are called *improbable:* there is against them a kind of general counter-evidence. If a man deposes to a fact, to which nothing similar can be found in the scientific and historical records of past ages, and which is contrary to thousands of other well ascertained facts, it is evident that his testimony can hardly command implicit belief.

The degree of belief, which the testimony of any particular person whose sincerity is not suspected, produces, depends on the apparent clearness and soundness of his intellectual faculties. A want of understanding, of judgment or of memory, an ill regulated imagination in the witness, take much from the credit which would otherwise be attached to his evidence. If, again, the witness be thought dishonest, or known for his habitual disregard of truth, or be in any way interested in the question at issue, the value of his testimony is thereby more or less impaired. The questions which the Judge must ask himself on this point, are these: May not the witness have been

mistaken; may he not wish to deceive me; or does the fact deposed to necessarily imply the guilt of the prisoner?*

2. It is easier to *remember* than to *invent*, and, in the absence of any other motives, this constitutes a kind of natural sanction to evidence. A witness, when cross-questioned, could not in general, without much difficulty, substitute for the truth ready to burst out of itself, a falsehood which requires some mental labour to assume the appearance of truth.

In the most important affairs we are often compelled to act on the evidence of others, and the success or failure of our projects depends on the truth or falsehood of the information we have thus obtained. The high merit attached to veracity, is but the result of the great influence of that virtue on human happiness. In most instances, the popular sanction operates strongly in favour of truth. The only exceptions to this, are when truth might evidently be productive of evil and none can result from falsehood, as when a person deceives a mad man or a robber inquiring in what direction his intended victim is flying from him; or, from motives of humanity and benevolence, a physician gives to a sick person or his family hopes of the former's ultimate recovery which he does not really entertain; or from politeness we mitigate the expression of our dissent from another person's opinion, or in some degree exaggerate the merit of his exertions with a view to give him encouragement. Again, if a man indiscreetly applies for information which he has no right to ask, he can scarcely complain of receiving a reply not entirely consistent with truth.

The above exceptions however, particularly the last, should be taken in a very limited sense; in all cases generally veracity is a strict obligation. An honest man can hardly in any case wilfully and deliberately deviate from truth without losing some of his own self esteem. Truth is so sacred, that it would be perhaps better to admit of no excuse whatever for any offence against it, than to run the risk of opening a door to the unfortunate casuistry by which its most sacred obligations may be evaded.

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* A man was charged with a murder committed within a few yards of his house. A witness of the murder, being confronted with him, said: this is not the murderer. "Thank God," said the prisoner, "this one at least does not recognise me." The Judge interpreted this as an involuntary confession of guilt, and the man was condemned to death. A few days after, his innocence was established beyond a doubt.

The great force of the popular sanction on this point clearly appears from the infamy universally attached to the character of *liar*. This is more particularly the case with regard to evidence given in a Court of justice. The influence of this sanction however, it must be acknowledged, greatly diminishes when the object of a witness is, by a garbled evidence, to protect a prisoner from the operation of a law contrary to public opinion, that is, deemed tyrannical and unjust.

3. The religious sanction strongly supports the cause of truth. The doctrine of the Gospel admits of no exception on the subject.

An oath is a form or ceremony having for its object to strengthen the religious sanction to the highest possible degree. Whether this form or ceremony answers its purpose to any material degree, is however very doubtful.

The influence of an oath is considered to result from the operation of three sanctions: the religious sanction, that is, the fear of punishment from the Almighty in this world or in the world to come; the legal sanction, or fear of the legal penalties against perjury; and the sanction of honor or fear of infamy and disgrace. If however it be shown that an oath derives all its influence from the two last sanctions, it will follow that it owes none to the first. If the religious sanction had the power generally attributed to it, it would have that power in all cases without exception, since the solemn appeal made to the Almighty is the same in all oaths, whether in accordance with the popular sanction or not. But it is not so. Where the influence of an oath does not rest on the two other sanctions, the religious sanction gives it none. Every one knows, for instance, that the oaths so multiplied at the Custom House in England, those required from the Students of the English Universities, are mere forms treated as lightly by those who require them as by those who submit to them. The solemn appeal to the Deity which specially constitutes the religious sanction of an oath, is the same* in those cases as in a Court of justice, except that it is unsupported by the two other sanctions.

* This is not quite correct. The appeal to the Deity is the same in *form*, not in *spirit*. Those who take a false oath in the Custom House, do so in general under the impression that they *do not* thus incur the *religious* penalties of perjury, the said oath being then looked upon as a mere form, a taking of the name of God in vain certainly, but not actually an act of perjury, according to the ordinary sense of that term which implies an intention to deceive.

A confused and vague feeling tells us, that the religious obligation of an oath, rests on the supposition that God will punish the man who is unfaithful to it. If so, a tyrant by requiring an oath would, as it were, obtain the assistance of the divine power as an additional instrument of public oppression. This supposition is evidently too absurd to be maintained, and it has accordingly been acknowledged that there were oaths, as there are engagements, null and void; and consequently, that it is not the mere ceremony of the oath, but its *morality*, which constitutes its obligation.

A judicial oath is liable to several objections.

1st. It tends to produce in a Judge an undue confidence in the evidence of a witness. On what rests that confidence? Merely on the supposition of the influence which the religious motives of the witness have over all other motives of interest, affection, hatred, &c.

2ndly. It removes from the Courts of justice, good and worthy men whose religious opinions do not allow of the taking of an oath.

3rdly. In some countries it has produced a class of hardened wretches, who make it a trade to sell their evidence to the highest bidder.

4thly. The difference established by the law between the value of a testimony given upon oath, and that only proffered on simple affirmation, is often in direct opposition to the opinion of the Judge; while, in a proper and judicious system of procedure, the Judge should be left at liberty to decide according to his conviction, without regard to the number or oaths of the witnesses.

4. If to prevent false evidence it were enough to enact penalties against perjury, the task of the legislator would be easy, but this offence is one of those which it is most difficult to prove. The effect of a penalty is in proportion to the certainty of its infliction, and unfortunately it is extremely difficult to convict a false witness, particularly if he has only given a garbled and incomplete statement. A good system of procedure, the strict examination and cross-questioning of witnesses, and public opinion, have more influence in securing correct evidence, than all the penalties of the criminal law.

CHAPTER V.

OF THE IMPOSSIBLE AND THE IMPROBABLE.

Is there a certain mark, a *criterion* by which one may distinguish whether a fact be possible or not?

If such a mark existed it would be extremely useful. Should any extraordinary fact be deposed to by a witness, its impossibility might be ascertained and the testimony rejected at once.

The discovery of such a criterion has not however been made. It is generally admitted at the present day, that no fact contrary to the laws of nature, should be received as true in a Court of justice on the credit of human evidence. In an immense number of physical facts, which, in times of primitive ignorance, may have appeared isolated and independent of each other, a constant and regular order has been observed. The order of succession, in which each class of those facts happens, is dependent on a cause, and the constant and invariable mode of action of that cause is considered as constituting a law of nature.

From the above it will be seen that our notions of the laws of nature, being nothing else but the result of past observations duly recorded, must vary in different times and countries, according to the state of knowledge. For instance, the belief in witchcraft and astrology long prevailed in Europe; and less than a century ago, a charge of witchcraft would have been there admitted, in many a Court of justice, on very slender evidence. At the present day however, any man, a little above the vulgar crowd, would treat such an imputation with immediate and well deserved contempt. A deeper study of natural phenomena, and the order or manner in which they happen, has shown the powers attributed to magic and witchcraft to be completely opposed to the analogy of the laws of nature. In addition to this, the very slight foundation on which, generally, the facts quoted as proofs of the existence of those powers, have been found to rest, the frequent discovery in modern times of the deception or error

which led to their being believed, have produced in the minds of educated persons in Europe, an all but universal disposition to reject any facts of this kind without even the slightest examination. And yet those follies, so generally disregarded among us, are still the object of almost universal belief among African and Asiatic nations.

To show how much depends, in this respect, on the state of knowledge in a particular country, let us suppose that a traveller relates to a well informed European, and some ignorant chieftain in the interior of Africa, that in the course of his travels he has met with a tribe of men who are twelve feet high. The former who knows, that there can scarcely be a single inhabitable spot on the earth which has not been visited by Europeans, or at least about which some trustworthy information has not been obtained, that by the unanimous testimony of the most respectable modern travellers, the average size of men appears to be between 5 and 7 feet, and that no well authenticated instance exists of a man having reached nine feet, will immediately reject the story with scorn His incredulity is grounded, on the opposition of such a fact to the general uniformity in the size of men in all countries hitherto known; and the very great improbability, that such a tribe of giants should never have been seen or heard of before. It would appear to the European infinitely more probable, that the traveller who relates such a fact is an impostor or a lunatic. The barbarian chieftain, on the contrary, who knows nothing beyond his frontiers, or the frontiers of the neighbouring states, who has perhaps before heard fabulous stories of men of enormous size, who has but a vague idea of the extent of the earth and the variety of its productions, would evidently not have the same reasons to reject as false the story of his visitor.

Since our opinions relative to the possibility or impossibility of certain facts, depend on our knowledge of the laws of nature; and that knowledge varies in degree in different times and countries; it results that any fact, however extraordinary, which may become the subject of judicial investigation, might be considered by some men as credible. A fact which, in London and Paris, would now be at once, without any examination, rejected with contempt, would have been there very generally credited a few centuries ago, and would at the present day meet with ready belief in India.

The facts considered as impossible may be divided into two classes; 1st, those which are in contradiction to some well known law of nature, and are therefore held to be totally impossible; 2ndly, facts in some respect similar to others which happen every day, but differing from them in *degree*.

To enumerate the former, would be to give a complete list of all the facts, and their consequences, implied in the observations which have been called *laws of nature*. This, in the present state of knowledge, is impossible. There are however a number of well established principles of belief, which may at once warrant the rejection of evidence in opposition to them.

"The same body cannot be at one and the same time in two different places," is one of those principles, against which no human testimony, however positive, could in civilized and enlightened countries prevail for a moment. A well established *alibi* furnishes the most satisfactory proof of the innocence of an accused person

Suppose, however, that in England, the greatest distance over which a man has ever been known to have travelled in twenty-four hours, is three hundred miles. If a man should be seen, in the space of twenty-four hours, in a place three hundred and fifty miles distant from the spot where a certain crime, imputed to him, has been committed, the impossibility of his having travelled over such a distance in such a short time, would be a question of *degree*. The fact, involved in the accusation made against him, would be *improbable*, but would not be in obvious contradiction to the laws of nature. The error or dishonesty of the witnesses against him, might be much more probable than the extreme celerity with which he must have travelled, immediately after the commission of his crime, if their testimony be true; but still it might be thought desirable, if the testimony appeared otherwise trust-worthy, to inquire whether some improved means of conveyance, or some peculiar circumstance, might not have rendered possible, what would before have been considered as impracticable.

It would be extremely interesting, to have an accurate and authentic statement of the extreme limits, within which deviations from the usual laws of nature have ever been known to take place. For instance, to confine ourselves to mankind, how very interesting would it not be to know the extreme limits of

1. Size of body.
2. Physical strength.
3. Duration of life.
4. Abstinence from food.
5. Period of gestation.
6. Number of children born at one birth.

Suppose the tallest man ever heard of was eight feet high. Is it possible for another man to be one inch taller? Can the possibility of two additional inches be admitted? If so where are we to stop?

No man could carry a grown up elephant on his shoulders, many could have done so at its birth. How can we know, at what precise period it would have become impossible to this or that individual to carry it?

A man who receives a pension from the State, sends his life certificate, from which it appears the man is a hundred years old. This is somewhat extraordinary but it is possible. Suppose however his certificate should imply that his age is a hundred and fifty,* or a hundred and eighty; can it be true?

Some women are known to have had *four* children at one birth. Is it possible that *five* should be born at the same time? A child is brought into the world, ten months or eleven months after the death of its mother's husband; can it be considered as *his* son? A succession is claimed by a man whose mother must have been sixty years old when she gave him birth; can such a claim be rejected at once?

It is easy from the above, to perceive how important it may be in some cases, for the administration of justice, to know the limits of the possible as much as they can be known from past experience.

The argument against the truth of a deposition, drawn from the impossibility of the fact deposed to, is in reality grounded on nothing but circumstantial evidence. The fact alluded to, is in contradiction to the ordinary course of nature known from general experience, and as may be directly proved by the testimony of an indefinite number

* Some men are said to have reached in modern times 161, 169 and even 180 years.

of individuals. This constitutes a mass of general counter-evidence in opposition to the special testimony given.

Suppose a witness deposes he has seen a woman, who is prosecuted as a witch, riding in the air with extraordinary rapidity on a broom-stick. Do you believe this fact?—No.—Why not?—Because it is impossible.—Why impossible; how can you prove this?—There is no use for proof, the supposed fact is an absurdity: no man in his senses can for a moment argue upon it

This indeed is a prejudice, but it is one creditable to the present state of civilization. What we so readily reject however, would have been easily credited by our ancestors, and the man whose opinion has no better foundation than the prejudice alluded to, would probably have condemned the witch, at the time the existence of witchcraft was generally believed.

What reason have we in reality to reject the fact alluded to? We have this: it is opposed to what we know of the laws of nature. One of those laws is, that no body, specifically heavier than air, can float in the atmosphere without some force to counteract the attraction of gravity. By rejecting as impossible the asserted fact, nothing is meant than to state its incompatibility with the immense mass of facts previously ascertained, and from which results the principle above laid down. No one has ever *seen*, *heard* or *read* of, a body heavier than air, floating in the atmosphere without support, or without being impelled by an adequate force.

The above, however, is not a direct proof, it is a collection of circumstantial or negative proofs, and no more The value of those proofs is in proportion to the present state of human knowledge, or rather in proportion to the acquaintance with the laws of nature, of the person by whom the evidence is to be appreciated. There is nothing absolutely conclusive in such evidence, because it may always be objected that we do not know all the laws of nature, or the exceptions to which they are liable, but what gives an irresistible force to that argument, is generally the weakness of the direct proofs brought against it in support of any particular fact of the description alluded to that is, in general, the much greater probability that one or two witnesses should have been dupes or impostors, than that a law of nature which from the beginning of the world to the present time,

appears to have constantly prevailed, should, in the special instance alluded to, have for a moment ceased to operate.*

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* Facts at variance with the ordinary course of nature are often credited on the slightest evidence. The celebrated Lavater, visiting his friend the philosopher Bonnet, told him that he came to him for a special object of the highest importance. I know at Merah, he said, a woman who has the wonderful faculty of seeing in a bucket of water as in a mirror, any point on the surface of the earth towards which her attention is directed. To put this however beyond a doubt, I beg that you will four times a day, at such and such an hour, keep an exact register of what you are doing, I will at those hours question the woman on the subject, and keep a record of her replies.

Bonnet tried to remonstrate with his friend on the folly of believing in the existence of such a faculty, but as Lavater insisted, he at last consented to make the experiment. The first day the woman exclaimed, that she saw Bonnet seated in an arm chair near a table, and a lady lying on a couch; the next day she saw him delivering a parcel of books to some body. It so happened that in those two instances her guesses were not far from the truth, and if no exact register had been kept would perhaps have been said to be wonderfully correct; but when the two journals were compared, Lavater, humbled, never said any thing more in favour of his oracle, though he had not the courage publicly to expose the imposture.

The belief in dreams, or in astrology, is grounded on some imaginary connection between certain dreams, or astronomical facts, and the general course of events. A man who has once fancied he remarked some analogy, between a dream he has had and some event which happened to him afterwards, if at all disposed to superstition, cannot easily be persuaded that the two facts have no connection whatever with each other, and that their successive occurrence is perfectly accidental. Although he may have dreamt a hundred times, without any thing happening to him afterwards which he might connect with any of his previous dreams, this fact is not taken notice of. and the vague and casual analogy, which he remarked in a solitary instance, is alone remembered, not only by himself but by those to whom he may have related that circumstance, and who also forget how many times their dreams failed to bring after them any thing extraordinary. The same remark applies to the belief in astrology.

CHAPTER VI.

OF JUDICIAL TAXES.

JUDICIAL Taxes are generally levied in the shape of fees or stamps on law papers. Those who advocate such taxes state two reasons in their favour.

1st. "The expenses of an establishment," they say, "should be "borne by those who make use of it. The members of the commu-"nity, who apply to the Courts of Justice for the maintenance or res-"titution of their rights, should pay for that immediate service."

The principle above stated is in itself undeniable, but it does not apply to the case in question. The Courts of Justice are kept up for the general advantage of society, and the protection of the rights of all. Those who are left undisturbed in the enjoyment of their property and rights, are indebted for the security they enjoy to the establishment alluded to. Those, on the contrary, whose possession is disturbed, either through the error or dishonesty of an aggressor, or in consequence of some obscurity in the law, are not so effectually protected as the former. The Courts of Justice may indeed save the latter from ruin, but not from the anxiety, trouble, expense, loss of time, &c. necessarily resulting, under the best system of procedure, from being concerned in a lawsuit. Is it fair then, to impose an additional charge on those who, instead of being secured by the law in the complete and peaceful possession of their rights, are so unfortunate as to find it necessary to apply to the Courts of Justice for their protection? Strictly speaking, equity would rather require that some compensation should be given at the public expense to the honest suitor, if no indemnity can be obtained by him from the unjust aggressor.

Judicial Courts are to the security of individuals, what a military force is with regard to the protection of the state against external enemies; the suitors are the unfortunate soldiers whose sacrifice insures the public safety. To throw on them the expense of the judicial establishment, in addition to the expenses and troubles insepara-

ble from a lawsuit, is as if, in case of a hostile invasion, the inhabitants of the frontier were left alone to defend it with their lives, and, in addition to this, were made to bear all the expenses of the war.

2nd. The second argument in favour of judicial taxes is "their "tendency to diminish the number of suits and check a spirit of "chicanery."

This argument, which has been more generally brought forward than the preceding one, deserves a more thorough examination.

The word *lawsuit* has two meanings: in a *neutral* sense it expresses nothing but the just exercise of an essential right; in a *bad* sense, however, it means an abuse of the exercise of that right.

With regard to the meaning first stated, judicial taxes cannot be recommended as a means of diminishing lawsuits; this would amount to nothing less than expressing the wish of a denial of justice in the cases alluded to.

The word *lawsuit*, in its unfavourable acceptation, implies either the idea of an *unjust* or of a *frivolous* cause.

That, by means of judicial taxes, the number of suits may be diminished to any extent, cannot be denied. But have such taxes a tendency to diminish the number of *unjust* suits? No, far from it; they only encourage them. It is an additional advantage put into the hands of a fraudulent party.

Let us examine first, the case of a *plaintiff* who institutes a suit which he knows to be unjust. If there were no unnecessary expenses to be incurred before the decision of the suit, he would have no means to annoy the defendant, and consequently little inducement to set up a claim which, it is probable, will in the end be decided against him. But the fiscal law comes to the assistance of his malice or his cupidity. He is rich, and a lawsuit is a pastime for which he can afford to pay; he has selected his victim and plays part of his superfluous income against the limited means of the defendant; he can calculate the moment when he will compel him to yield to an unjust demand, or at least to submit to a compromise, which will save him from utter ruin only by giving up part of his rights.

With regard to an unjust *defendant*, it is true that the abolition of judicial taxes, would not remove all the motives which may induce him to refuse to comply with a just claim, but the strongest of those motives would cease to exist. What in fact makes him obstinate in

his resistance? He knows the circumstances of the plaintiff, he knows he cannot institute the suit without advancing a certain sum, and that he is likely to hesitate before he does this. When the suit is once instituted it cannot go on without further payments; the fraudulent defendant perhaps perceives that the plaintiff relents, that his means appear to be exhausted, he takes good care himself to hold on, the plaintiff in spite of his good cause must soon be compelled to yield.

The motives, which generally produce the obstinacy of an unjust *defendant*, are: ill will, avarice or bad temper, difficulty of satisfying the claim put forth, the hope of seeing the plaintiff fail in his proofs or in the means of carrying on his suit, and the chance of some fortunate accident as the death of the plaintiff or of a witness. The abolition of judicial taxes would not prevent the operation of all the motives of a dishonest defence, but is the legislator to aggravate an evil because he cannot remove it altogether?

The other kind of suits, which judicial taxes are intended to prevent, are what are called *frivolous* suits, suits for *trifling* sums.

The expression *unjust suit* is intelligible enough, but this is by no means the case with *frivolous suit*. An injury may be trifling to one individual, and of great importance with regard to another. In appreciating the evil of an offence, the danger of its being repeated and that of example must be taken into consideration: an injury, however slight in itself, may become intolerable by repetition.

In pecuniary cases, this reproach of frivolity is readily made when the sum in dispute is considered as small; but what is a *small* or *large* sum? Are not these terms entirely relative to the circumstances of the interested parties? The amount in rupees or gold-mohurs has nothing to do with the question. The income of an individual may be a hundred, or a thousand times that of another. The common labourer who claims a debt of one rupee, claims a sum required and sufficient to support his family for a week; the opulent man who sues another for a few hundred rupees, claims a sum which he might spare without the least inconvenience.*

Suits of small amount do not require to be checked by any artificial means. Independent of judicial taxes, the unavoidable expenses,

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* See further remarks on this subject, in Chapter I. Book III.

the trouble and loss of time attending them, are but too powerful to prevent their being instituted.

Suppose the object in dispute to be ever so small; if the plaintiff be wrong to institute a suit to obtain redress, how much greater is *not* the fault of the defendant who refuses that redress? If you blame the former for his litigiousness what will you say to the latter? If the tax be a check to blameable plaints, is it not an encouragement to refusals still much more blameable?

If the legislator wishes to prevent the institution or defence of unjust suits, why not treat that offence like others, distinguish innocence from guilt, proportion the punishment to the offence, and avoid confounding the innocent with the guilty? Before inflicting punishment the offence must be ascertained, and this requires that the fiscal expenses of the suit should not be paid till after its conclusion. If in the course of the trial it appears that one of the parties is blameable, on him will fall the punishment and on him only. Thus a dishonest defendant will know beforehand, that, by refusing to satisfy a just claim, he will not only be condemned to make it good, but must besides expect to suffer a pecuniary penalty, in the shape of a fine, or in that of a tax imposed on every paper in the record of the suit.

What has probably led to the general adoption of judicial taxes in Europe, is that they have been confounded with others levied by means of a stamp, and which are not liable to any particular objections. But nothing could be more different, with regard to consequences, than taxes on objects of luxury, or on contracts, and taxes on law papers, though superficial observers have allowed themselves to be deceived by an apparent resemblance. Stamps are in some cases a proper tax, judicial taxes are levied by means of stamps, therefore judicial taxes are unobjectionable, &c. Such is the illogical argument which has misled them. But another cause, which probably has had still more influence on the adoption of this fiscal resource, is the want of opposition by any part of the community. A tax on certain commodities falls on the consumers of those commodities who immediately unite to oppose it. A tax which falls on any particular class, is likewise opposed by that class. But suitors do not form a separate and distinct class in the state, they do not make common cause; what is unfavourable to one is an advantage to another. These taxes fall only *occasionally* on any particular individual, and

no one looks forward to the probability of having to pay them. Thus no strong opposition is made, and perhaps even the rich and influential are not sorry to see those taxes established. They know what a power they put into their hands, and it is natural to man not to dislike a power which he might abuse, even when generous enough not to wish to abuse it.

Recapitulation. If the above reasoning be correct, judicial taxes (whether levied by means of stamps, or fees, or in any other way) are the worst of all existing imposts; they have in some instances the effect of a denial of justice, and are in general a tax levied on the unfortunate; they throw the burden of supporting judicial establishments, not on those who reap the greatest benefit from those establishments, but on those who are benefited by them in the least degree; and far from having a tendency to diminish the number of dishonest suits, they tend directly to encourage them.

BOOK II.

CONDUCT OF SUITS

CHAPTER I.

1. APPEARANCE OF THE PARTIES BEFORE THE JUDGE AT THE BEGINNING OF THE TRIAL. 2. ON WHICH OF THEM IS THE BURDEN OF PROOF TO BE IMPOSED? 3. ATTORNEYS. 4. EXAMINATION OF WITNESSES. 5. RECORDS OF EVIDENCE. 6. CLOSE CUSTODY.

1. LET the parties appear before the Judge, and be required to state themselves the facts of the case, and to answer all questions put to them. Let them if first examined separately, be afterwards confronted with each other, and in most cases all doubtful points will soon be cleared up and truth will appear with evidence; either because the parties, misunderstanding each other, required to come to an agreement nothing but an impartial and enlightened intervention; or because the penetration of the Judge has found out the bad faith of one of them in his evasive answers, his contradictions, or even in his silence. This personal examination will act as a check on those who, more influenced by the fear of confusing themselves in undergoing their examination, than by that of for ever disgracing themselves by a dishonest suit, would not scruple to lie through the mouth of another, though they would not dare to do it themselves. Or if such persons venture to run the risk of a public examination, they will have to encounter the difficulty of such a part, the danger of contradicting themselves when strictly cross-questioned, and the fear of the shame and punishment which would attend the discovery of an attempt to impose upon the Court.

The appearance of the parties will, besides, have the effect of greatly shortening the preparatory steps of the trial, by establishing

clearly the state of the question, and by each being able at once to perceive which of his assertions requires to be supported by evidence.*

2. Upon which of the two parties should the obligation of proving his case be imposed?

This obligation should be in every instance imposed on the party against whom the presumption is, or who can prove his case with least inconvenience, expense or difficulty: this will in general be ascertained on the first simultaneous appearance of the parties before the Judge.

It is generally assumed as a principle, that the party who sues should prove his allegation, but however plausible this theory may appear, experience has proved that the attempt strictly to carry it into execution, produces useless delays, vexations and expenses.

In the natural system of procedure, the allegation is in itself already a proof, at least so far as the plaintiff or prosecutor himself comes forward as an immediate witness, although such a proof is of course not equal in force to a similar allegation by a disinterested witness, or still less to an allegation or admission to the same effect by the adverse party.†

It must be granted however that the plaintiff is the party chiefly interested in furnishing the proof, because, if his allegation be not credited, on him will fall the consequences of his failure.

Thus it is always the plaintiff, or prosecutor, whose responsibility is first engaged in the suit. It is expected that he should be prepared with some proof of his allegation, because, if that allegation be not proved, he cannot get out of the case without some pecuniary loss or some disgrace. The defendant, on the contrary, may gain his suit without proving, or even attempting to prove, any thing; merely by formally denying the allegation of the plaintiff.‡

See further Chapter III

† Sir H. Strachey states that in India the proportion of unfounded, to well founded, plaints, is five per cent. at the utmost, (Mill's History of British India, vol. v. p. 457,) so, the general probability in favour of the truth of the plaintiff's claim is, under the Anglo-Indian system of jurisprudence, as 19 to 1.

‡ In a criminal case, the defendant is assumed to be innocent so long as

Suppose A sues B for a sum of money, which he states he lent him privately without taking any receipt. If B replies, that it is true he received the money but that he has since repaid it, from whom is the proof to be required?

This must altogether depend on circumstances. If A has no proof whatever to afford of the correctness of his claim, B's reply must be taken with its qualification. To enact as a rule of procedure in such a case that B, acknowledging that the sum was really lent to him, should be required to prove that he repaid it, would be to furnish him with a strong inducement to deny the transaction altogether. Such a rule might besides be grossly abused. If A be a rogue, he might sue B for a sum which has been repaid to him, and which he knows B is too honest to deny having received, though he cannot prove having repaid it.*

The above implies that A has no proof to afford of the loan, so that if B chose to deny the transaction altogether, the suit must be dismissed as a matter of course, the assertion of both parties being contradictory without any reason to prefer that of the plaintiff to that of the defendant. If however A can in any way prove the loan, it would of course turn the presumption in his favour, and neither B's simple denial, nor qualified acknowledgment of the loan, could save him from being ordered to repay it, unless he proved he had already done so.

In case of a suit for a debt, if the defendant denies the debt, and the plaintiff cannot prove his case, the latter should be allowed to demand that the former confirm his assertion by an oath or solemn affirmation.

If a party to the suit, happen to be a stranger to the facts on which the event of the trial depends, or, in consequence of sickness

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he is not proved guilty. Whenever the evidence against him is considered as doubtful, the benefit of the doubt is given him and he is acquitted.

In a Civil suit, the *possession* of the thing in dispute, is generally held to be a sufficient title, so long as no better title is brought forward by the other party.

* The fact of A lending him money privately and without taking a receipt from him, is a presumption in favour of B's honesty, since, if A had not considered him honest, he would not have made him any advance under such circumstances.

or some very urgent and important business, is unable to attend, his personal attendance may be dispensed with by the Judge, but it should be left to the discretion of the latter to enforce it, whenever it may appear to be necessary.

3. Some doubt has been expressed regarding the necessity of admitting a professional lawyer in an oral examination to act as the representative of a party, but the great difference which may exist in talents, experience, self-possession, rank, &c. between the parties, seems to establish the propriety of admitting professional men to put the parties as much as possible on a footing of equality.

It is true that the Judge would otherwise, in this as in all other cases, act as the counsel of both parties, but, to do this with effect, it is not only necessary thoroughly to understand the case, but also to possess sufficient zeal and energy to do justice to it at whatever trouble. The presence of advocates insures this, and its influence on the Judge cannot but be in the end salutary to the cause of justice.

4. The usual modes of examining witnesses may be reduced to four.

1st. They are orally examined by the Judge himself in the presence of the parties and in public.

2ndly. They are orally examined in private by the Judge.

3rdly. They are orally examined, more or less privately, by some of the ministerial officers of the Court, and their statements are taken down in writing to be afterwards submitted to the Judge.

4thly. They are examined by written questions to which they furnish written answers.*

The superiority of the first kind of examination is now generally admitted. Publicity is the most efficient safeguard against false evidence; the presence of the parties concerned, and that of the Judge, to the examination, give the best possible opportunity to appreciate the value of each testimony. The solemnity of a public examination excites the attention and awe of witnesses to the highest degree.

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* This mode of examination is, in general, only resorted to when the witness is so far from the Court where the case is tried, that it is not considered advisable to require his presence. The written questions are then sent to another Judge who calls for the witness replies to them, and either receives them in writing, or takes them orally and records them himself. Evidence of this kind must obviously be admitted with great caution.

No man not yet entirely depraved, can publicly swear to a falsehood. He feels as if among those who hear his assertion, some one would start up to contradict him if he did not speak the truth. Besides, few dishonest suitors can be reckless enough to expose a suborned witness to a cross-examination in public. Such witnesses, however well instructed, cannot be prepared at such a moment for any unexpected question which may be put to them. The Judge sees their hesitation, their confusion, and hears their contradictions. One question and the reply made to it, suggests another question. If the witness hesitates, or contradicts himself in his testimony merely from timidity or from reluctance to speak out, the Judge will encourage him, and will duly, in his appreciation of the evidence thus given, attend to that circumstance. Since the Judge is the person who is to decide the case, it is of the utmost importance, that no circumstance, which can aid him in discovering the truth, should escape him.

In addition to the above it must be remarked, that, in a public examination, witnesses are comparatively secure against a misrepresentation, or misapprehension, of their evidence. It is true that if the examination be taken in secret by the Judge, or by one of his ministerial officers, the written record of the questions and answers must be signed by the witness, but how very weak this precaution is in many cases against misrepresentation. How very easy it is, either through inattention or purposely, in the case of a simple and ignorant witness, to record his evidence in such a way, as to lead to quite a different conclusion from that, which a careful and impartial examination would have produced.

The comparative value of the evidence of two witnesses, is sometimes so very different in consequence of the tone and the manner in which it is given, or their previous character, that it would seem desirable for a Judge to have some means to record on each written evidence, both for his own satisfaction and for the information of the appellate Court, his sense of its value.

Suppose, for instance, that the clear and positive testimony of a workman or a shop-keeper, or any other man of the lower class or of the lower part of the middle class, who has no personal interest in the case, and against whom there exists no cause of suspicion, be considered as equal to the number *six*; that of a member of the community of known respectability, and whose word every one, generally

would trust, might be valued at *ten*. Between *six* and *ten*, would be the different degrees of trust-worthiness of the evidence given by men whose respectability is more or less known, but who all are disinterested in the case and free from suspicion. Below six would be indicated the degrees of credit, which it might seem proper to attach to the testimony of those, against whom some suspicion of partiality, dishonesty, want of understanding, memory or candor, exist.* The Judge would in every instance, state on the recorded evidence, his reason for ranking it above or below the standard of *six*. This method might at first appear singular, but as soon as Judges of every grade had from a little practice become reconciled to it, there can be no doubt that they would find it useful.

5. The above supposes that the evidence of each witness is recorded in writing, a practice which has great advantages, though also liable to some objections.

The depositions of a small number of witnesses may remain clear and distinct in the memory of the Judge; but if the witnesses are many, the facts intricate, and the case cannot be decided immediately, it would not be prudent to trust to memory; a more permanent record must be kept.

The usefulness of that record, does not consist merely in the permanency it gives to the evidence for the benefit of the Judge, but it tends to impress on the witness the necessity of care and attention in expressing himself. It is besides a check on the Judge; if each deposition was merely verbal, it would leave him great latitude to give such a decision as his caprice might dictate. How could it be proved in an appellate Court that his decision was opposed to the evidence? If in case of appeal the witnesses were in every case summoned to the presence of the appellate Court, to how much expense and trouble would they not be subjected, and how many proofs would disappear from the death or forced absence of witnesses!

Although it would be desirable, in all cases, for securing the pur-

* It might of course happen, that the evidence of a man of known character and respectability, should be rated at more than six, although he was somewhat concerned in the case. Between 0 and 10, the Judge, after considering every circumstance known to him with regard to the witness, would to the best of his judgment, express the degree of trustworthiness of the witness.

poses of justice, to keep a record of the depositions of witnesses, as this cannot be done without delay and expense, it is better on the whole that this should be done only in the most important cases, leaving to the Judge the power of ordering it at his own discretion, or on the application of one of the parties who should state a sufficient reason for his request, and might be bound to bear the expense.

Suits for debts, personal injuries, and other cases in which there is no doubt regarding the fact, or the point of law, may best dispense with the means of security here adverted to, and those suits bear an immense proportion to all others put together. The cases in which it appears most necessary to keep a permanent record of the evidence, are those which relate to real property, the condition of persons (births, marriages, &c.), and crimes for which severe punishments are inflicted.

The record of a deposition should include both questions and answers, and even all sudden gestures, exclamations or other symptoms, which may serve to indicate the disposition of the parties or witnesses.

Where it is not considered necessary to keep a regular record of the witnesses' evidence, the Judge, or some officer of his establishment, might be required as he is examining each witness, to write a short abstract of his deposition. Those notes might be signed at the conclusion of the suit by both parties, or their vakeels, or, if this attestation of their correctness should be refused, reasons would be assigned for such a refusal, and the witnesses about whose deposition there was any doubt might be re-examined.

6. When it is intended to deprive, as much as possible, a prisoner charged with some heinous crime, of all means to impose upon public justice, by arranging with his accomplices a plan of defence founded on imposture, by corrupting witnesses, &c., he is kept in *close custody* and not allowed to communicate with any one.

This precaution is liable to two very strong objections: 1st. Solitary imprisonment is a great evil which should not if possible be inflicted on a man who perhaps is innocent. 2ndly. The stopping of all communications between the prisoner and his friends may deprive him of his means of defence, and enable his enemies to destroy the proofs which he might have brought forward for his justification.

When the charge is of such a nature as to require the immediate

arrest of the supposed criminal, the only time during which it may, under ordinary circumstances, be necessary to keep him in close custody, is that which precedes his first examination. After he has been once examined, and his deposition has been recorded, his line of defence is determined, and though he may afterwards pretend to have made some mistake or omission, his original statement furnishes an object of comparison with which to judge of his veracity in his first or subsequent depositions, and accordingly in some degree of his guilt or innocence.

If there be grounds to suppose that a witness from some partiality, dishonesty or any other cause, is disposed to arrange with the prisoner, or with other witnesses, to give false evidence in favour of the former, he also may be kept in close custody until his examination. He should of course be examined without any avoidable delay, and the measure adverted to should not be taken except where it may be justified by the importance of the case. The imprisonment of a person, who may be innocent, for a period however short, is no doubt an evil, but it may in some instances tend to prevent a much greater one. Such an imprisonment is not a legal penalty, but a mere precaution which may apply to a witness suspected of an intention to evade justice, as well as to a person suspected of any other crime

CHAPTER II.

EXCLUSION OF WITNESSES.

Proper causes of exclusion. Irrelevancy or uselessness of the evidence. Excessive delay or expense. Public considerations.

A Court of justice can see and hear only through witnesses, and it is therefore singular that a system of exclusion, extending to whole classes, should have so generally prevailed. The rules of exclusion have been various, and not unfrequently contradictory, among different nations. Witnesses have been excluded on account of their tender age which was not considered to give them a proper discretion calculated to inspire confidence; on account of their sex, women being supposed ever to remain in a state of nonage; in consequence of being slaves, and therefore held incapable of giving evidence against free persons; as being related to one of the parties, it being supposed contrary to natural justice to call on a wife to depose against her husband, or to require a son to speak against his father; in consequence of their religion, infidels being thought unfit to give evidence against true believers, or the nature of the oath or affirmation permitted by the laws of one sect, not being supposed to render the evidence of the followers of that sect worthy of belief; in consequence of having a pecuniary interest in the case, the most insignificant degree of personal interest being supposed sufficient to induce a witness to give false evidence; lastly, on account of a previous condemnation in a Court of justice, this circumstance being held to render the testimony of a man in every case so suspicious that it is not safe to receive it.

The exclusion of a witness may be positive or negative. It is *positive*, when even if the witness be brought forward, his evidence cannot be received. It is *negative*, when either through negligence or intention, the measures necessary to obtain his evidence are omitted.

Let us not decide this question on the authority of the past, but examine if there are cases in which, on the principle of utility, some kind of evidence may be excluded.

The evil which may result from the non-admission of a witness, depends on the following circumstances:

1st. With reference to the question at issue, are there other witnesses in favor of the same party?

2ndly. Is the party, deprived of that assistance, the plaintiff or the defendant?

3rdly. Is the suit a civil or a criminal one?

If in a criminal case the prosecutor has only one witness to bring forward, and that witness be excluded, the effect of that exclusion is to proclaim, that a similar or any other injury, may be inflicted again with impunity in the presence of such a witness.

If the above happens in a civil suit the same consequence will follow.

If, instead of the plaintiff, it is the defendant who is deprived of the only witness he could bring forward for his justification, this leaves the field comparatively open to the former to subject the latter to the most onerous obligations, and even to ruin him altogether.

Where the excluded testimony is not the only one to be had, the evil of the exclusion may of course be much diminished; but, so far as the exclusion tends to weaken in any degree the necessary evidence, so far it must be considered in itself objectionable.

To exclude one class of witnesses, is to permit all imaginable transgressions in the presence of witnesses of that class.

To require two witnesses for conviction, is to grant impunity to any crime committed in the presence of only one witness.

There are cases in which it may be proper to exclude evidence, not with the view of furthering the special ends of a proper judicial administration, but for some other object of the greatest importance to the parties. The exclusion of a witness is always an evil in itself, but it may be a lesser one than those which the bringing forward of that witness would produce.

It is clear that when the evidence of a witness is irrelevant to the question at issue, or quite useless, the case being sufficiently well established without it, his presence should not be required.

Is a testimony grounded on mere *hearsay* to be admitted? There are apparently two instances in which this may be done, and they are these: when no other proof can be obtained, or when a witness gives in a Court of justice evidence contrary to what he had previously

stated as a fact to other persons. Evidence of this kind, however, can only be considered as a ground of suspicion, or an imperfect proof.

What is said of a testimony grounded on hearsay, may also be applied to the copy of an original document supposed to have been altered subsequently to the copy being taken.

If one of the witnesses, from being at a great distance, or for any other reason, cannot be produced by either of the parties till after a considerable lapse of time, and the delay must entail irreparable loss on the other party, the Judge is reduced to a choice of evils. The best mode of getting over this difficulty is perhaps to decide the case without waiting for the absent witness, but to reserve the power of modifying the sentence when the witness, or at least his *affidavit* or written evidence, is produced.

If again a witness be at such a distance, that the expense of bringing him before the Court, would be quite out of proportion with the importance of the case under trial, his presence must be dispensed with. The evil of the exclusion may probably, in this case, be reduced to its minimum, by having him personally examined, wherever he is, by a special commission appointed for that purpose, or by sending a list of written questions to which he is called upon to give, in the presence of a public officer, his replies also in writing.

There are instances, where some particular evidence could not be called for without injury to persons unconnected with the case, or to the public. In such cases, it must be left to the discretion of the Judge to dispense with it or not, stating at the same time the reasons of his decision on that point, whatever they may be.

CHAPTER III.

IMPROPER CAUSES OF EXCLUSION OF WITNESSES.

1. *Weakness of intellect.*—2. *Infamous character.*—3. *Religious opinions.*—4. *Single testimony.*—5. *Unsatisfactory nature of oral proofs with regard to contracts.*—6. *Personal interest in the case.*—7. *Relationship.*—8. *Danger of self-crimination.*—9. *Being the Counsel of one of the parties.*

THE cause assigned for the exclusion of a witness in the following cases, is the fear lest his evidence should deceive the judge.

I. Weakness of intellect, either from extreme old age, infancy, or some natural want of understanding.

It is clear that, in such cases, the inability of the witness to give evidence must depend in every instance on the degree of the deficiency alluded to: the system of exclusion by a general rule disregards this, and in general can only do harm.

Is it to be supposed that a Judge, examining a witness in public, should take his evidence, and base his judgment upon it, though the witness was clearly incapable or imbecile? Would not the Judge, on the contrary, either dismiss him altogether, or question him with the view of obtaining some clue which may lead to further evidence; and all the time make due allowance for his incapacity?

II. Exclusion on account of Infamous Character.

Is it possible to admit the evidence of a man who has been convicted of perjury, or forgery, or some other heinous crime? Can such a man be trusted?

To this it may be answered that the more suspicious such a testimony, the less dangerous it is. It is only necessary to bring to the notice of the Judge and Jury the previous crime of the witness. After that there is no reason to fear that his testimony will be too confidently trusted to. Nothing but the clearest evidence, consistent with all the circumstances of the case, would produce conviction against the strong prejudice and distrust resulting from the character of the witness.

On the other hand, it is clear a man may have perjured himself to save the life of a friend, or for a large sum of money, who would not do so where he can have no interest in deviating from the truth.

III. Exclusion in consequence of religious opinions.

When any religious opinion has been considered as a cause of exclusion, it was only because the honesty of the witness was in consequence of his holding such an opinion, considered as suspicious. This however is a mere prejudice. Among so many sects which entertain such very different, or even contradictory, notions of the Deity, there is not one which does not consider God as the protector of justice, and the guardian of moral obligations without which society could not hold together A difference of opinion in other respects cannot destroy the credibility of a testimony which rests on such grounds.

If you consider even Atheism, however erroneous or dangerous such an opinion may be, to hold it is no reason why a man should not be admitted as a witness in a Court of justice. To acknowledge such a strange scepticism, so contrary to the almost universal belief of men, is at least a proof of sincerity; a virtue which may not belong to some of those who declare their firm adherence to the common opinion of mankind on the subject of the existence of a Creator. Why should a man be disposed to sacrifice his self-esteem, expose himself to disgrace and the penalties of perjury in this world, because he does not believe in a state of future rewards and punishments? This last check is indeed for him as if it existed not, but the others have still the same influence over him which they have on other men.

Some sects consider every kind of oath as sinful. To exclude the evidence of their members on this account, would be unwise. They look upon a solemn affirmation as equally binding as other men believe an oath to be. To allow the escape of a criminal, by refusing, on such a ground, to admit the evidence of a witness whose honesty and perfect credibility no body doubts, is absurd.

IV. Exclusion of a testimony because it is *single*.

A witness is not actually *excluded* because he is alone. his evidence is taken, but in some cases it has no legal effect; the law treats it as null. Though it may have every thing in its favour, and appear convincing to every body, the criminal against whom the single witness deposes must be acquitted.

Such a law seems calculated to insure impunity to all crimes which happen to be committed in the presence of only one witness. The reason which has led the legislator to require the evidence of at least two witnesses, is as praiseworthy as it is evident, but in endeavouring to avoid one danger he has fallen into a greater one. No doubt that the number of witnesses is an additional security against deception and error, but is this a reason why a single witness should be in every instance deemed unworthy of credit?

The condemnation of an innocent man will not necessarily result from the mere deposition against him of a false witness; it is not enough to produce such an effect that the evidence should be false, it is necessary that it should be *fully credited by the Court, notwithstanding all the reasons which may be alleged for suspecting it.*

Montesquieu says: "The laws which condemn a man to perish "on the deposition of a single witness are fatal to liberty. Common "sense requires that there should be two witnesses, because a witness "who affirms and a prisoner who denies constitute an equal division, "and a third party is required to settle the question."

Montesquieu apparently requires two witnesses only in a capital case. Many good reasons might have been brought forward with regard to cases of this nature, but the reason he gives is altogether unsatisfactory. The supposed equality between the testimony of the accuser and that of the accused does not exist. The former voluntarily comes forward, speaks at his peril, and incurs the penalties of perjury if his accusation be proved to have been brought forth by him knowing it to be false, while the accused party, under the terrors of the law, has every motive to deny the crime imputed to him. Under such circumstances, it is clear that where no direct suspicion attaches to the accuser, the presumption must naturally be in his favor.

How is it that Montesquieu did not strongly protest against that law of procedure which directed Judges to condemn to death on the deposition of two witnesses, this being considered *complete* evidence? How many unjust condemnations such a law must have produced! There are innumerable instances where no certain conclusion can be drawn from the number of witnesses. Sometimes one witness, by the respectability of his character, and by a clear and impartial deposition in accordance with all the circumstances of the case, may produce in every mind an irresistible conviction, where a dozen sus-

picious witnesses, although consistent in their depositions, would fail to do so.

V. Exclusion of oral proofs with regard to the terms of contracts.

It is easy to perceive the advantage of engagements or contracts, being *written*, instead of being merely *verbal*, agreements. But when, instead of writing down an agreement, it has only been made verbally, should it be considered on that account in a Court of Justice as null and void? or should the only kind of proof which may be brought forward to establish the reality of the engagement, that is, should human testimony, be admitted?

Those who have rejected oral proofs in such cases, have done so on the ground of their general vagueness and imperfection, and the danger of being deceived.

But suppose a Verbal agreement has been made, in the presence of respectable witnesses who all give the same account of the transaction, would it not be allowing a triumph to the dishonest not to admit the evidence of those witnesses? The success of such an impudent fraud far extends its immoral influence, and gives notice to the unscrupulous of the protection which their dishonesty may expect from the law.

It seems clear that in this, as in the instances previously referred to, it would be better to substitute the principle of suspicion to that of exclusion.

But it may be said, if it be well known that Verbal engagements are null and void in a Court of Justice, no such engagements will be made.*

This however supposes that legal provisions of this nature are universally known, which is certainly a mistake. Besides, there are many circumstances in which a Verbal agreement may easily be made, which it is not then possible to reduce to writing.

Let us suppose now a *written* contract with regard to which however some additional conditions have been *verbally* agreed to. In case of dispute is oral evidence to be admitted with respect to those additional conditions?

There is still less reason in this, than in the preceding case, to exclude oral evidence, because there is less danger for the Judge to be

* See further Chapter IV.

deceived. From the spirit of the Verbal agreement, and its consistency with the written contract, the Judge will be able to appreciate the reasons which may have induced the parties to omit the conditions alluded to in the written document, and how far it is probable that they actually did so.*

VI. Exclusion on account of Personal interest in the case.

When a witness has some Personal interest in a suit, which may induce him to give false evidence, the more that interest is evident the less likely it is to deceive the Judge. A false, incorrect, or incomplete testimony, is dangerous only when it is believed to be true and impartial.

If the interest of the witness in the case be of a pecuniary nature, its influence upon him may be estimated both from its amount and from the character of the witness. It is not natural to suppose, that any man, but particularly a man of respectable character, should act in opposition to his conscience, and expose himself to the disgrace and to the penalties of perjury, for a sum which constitutes but an insignificant part of his fortune.

VII. Exclusion of a witness on account of relationship to one of the parties.

Should a husband or a wife be called upon to give evidence in a case in which either of them is concerned?

English jurisprudence has decided in the negative. This would disturb domestic confidence, it is said. But who are those whose domestic confidence would be disturbed by the taking of evidence of this nature? Only those who abuse it to injure society. A criminal who might be convicted of a heinous crime by the deposition of a woman, has then only to marry her and he is safe! Why should such a chance of escape be given to the guilty? No doubt a wife may be very much disinclined to give evidence against her husband, but if she can be prevailed upon to do so why not admit her as a wit-

* The oral evidence would of course not be admissible against a third party whose interests would be injured thereby. Suppose for instance A mortgages his property to B for 500 Rs. by a written contract, and does so for 200 Rupees more by a verbal promise. If C on the faith of the recorded mortgage, knowing the property to be worth 700 Rupees, lends 200 Rupees on a second mortgage duly recorded, the verbal addition to the first agreement could not be pleaded against him.

ness? What is the evil of her repugnance compared to the necessity of discovering the author of a heinous crime?

But it is urged that she will probably perjure herself to save her husband? If however this reason should be considered sufficient in this instance, it ought to be so in many others where the obligation of giving evidence is imposed. In this case a false testimony in favor of the accused is not dangerous, because that testimony is naturally liable to more than ordinary suspicion, and it should be left to the Judge to appreciate its value according to circumstances.

If the connexion of husband and wife be not a sufficient reason of exclusion, no other relation, not even that of father and child, should be so. It is indeed desirable to have recourse to such evidence as seldom as possible, but would it not be absurd to say to the transgressors of the law: "Here are persons in whose presence you may "commit any crime with safety. For fear of hurting their feelings "they will not even be asked a single question which might injure "you."*

VIII. Exclusion of a witness because in giving his evidence he might criminate himself.

Among the singularities of the English Common Law, one of the most remarkable, is the rule which does not permit to put to an accused person a question by a reply to which he might criminate himself. Should such a question be addressed to him he is not bound to answer it, and his silence must not be legally considered as a presumption against him.

The prejudice in favor of this rule is so strong in England, so much stress is laid, in support of it, on prudence, security, sensibility, and respect for the unfortunate, that it requires no little energy to attack it.

Let us first state the direct reasons against the principle.

1. It is no doubt unpleasant to be examined about certain facts so as to be in danger of criminating one's self, but is there a legal penalty, nay, any legal inquiry, free from vexation and annoyance?

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* A shoe-maker who had hanged his wife, was condemned in England on the deposition of his daughter. If, under similar circumstances, he had committed the same crime on the latter in the presence of the former, he could not have been convicted.

Would it be wise to infer from this that legal penalties must cease to be inflicted, and that legal inquiries should no longer be instituted?

2. The case might be different if men, charged with any crime, were naturally disposed to exaggerate their own criminality, or to plead guilty when they are innocent. But as no such disposition has been discovered in human nature, it does not seem necessary to guard against it.

3. Suppose the prisoner at the bar is innocent. Can it be supposed that the rule in question is favourable to him? Of course not. To the innocent alone that rule can never be useful. He is free from crime but he is suspected; what can be more advantageous to him, what can be more eagerly desire than an opportunity of giving all possible explanations, of being questioned and cross-questioned in every way likely to elicit the truth? If criminals had united among themselves, and, after due deliberation, had established the code of procedure by which they were to be tried, the rule alluded to is probably the first they would have enacted for their protection. The innocent cannot wish to avail himself of it, he claims the right of speaking out; the criminal, on the contrary, claims the privilege of remaining silent.

4. In cases where there exists without doubt the greatest wish to discover the truth, and the greatest regard for individuals, is this famous rule ever observed? Did a father ever think of it in settling a quarrel among his children? Did a father ever fear to question them all one after the other lest the culprit should criminate himself?

When, however, the use of the rack prevailed in the Courts of other countries, when Judges, watching a miserable wretch subjected to the most atrocious torture, condemned him on the strength of any expression which could be considered as a confession of the crime imputed to him, it is perhaps natural that the English should have conceived a high opinion of the rule under consideration, which instead of submitting the criminal to torture, runs into the opposite excess of protecting him against the most natural consequences of his crime.

Another reason may have rendered this privilege dear to them. Among the penal laws of England, there were some so cruel that their strict execution would have produced a general feeling of disgust and horror. In such cases, the rule alluded to acted as a real protection to a person who had violated some absurd or oppressive

law, and must have been convicted if subjected to personal examination. So one defect of the law partly corrected another.*

But it will perhaps be said; if this mode of procedure has proved a safeguard against tyranny, may it not do so again?

No doubt it may; if cruel and tyrannical laws are enacted, whatever tends to prevent their execution may be considered as comparatively useful. It would be a strange mode of reasoning, however, to start from the supposition that laws will be oppressive, and to frame a system of procedure so as to afford the facility to evade them. Why not enact only just and good laws, such as are required for the protection of society, and enforce them by the most efficient mode of procedure?

Another objection to a personal examination, which has a plausible appearance, is that when a man is examined by the Judge he loses his self-possession, gives a garbled account of his case, and sometimes deviates from the truth with regard to the most unimportant particulars. He may thus impress the Judge, and particularly the jury, with the opinion of his being more guilty than he is in reality.

But it may be stated, in answer to this, that if the prisoner be publicly and honestly examined, every thing invites him to speak the truth. If he contradicts himself and tells lies, this is no doubt a presumption of his guilt, but the criminality of the fact imputed to him is not thereby increased or modified. If his false statements are credited they may turn to his advantage; if their falsehood be found out, it is not at all probable this can be injurious to him except so far as those statements may assist in discovering the truth.

Beccaria is opposed to a personal examination, because, "to call on a man to be his own accuser is to confound all relations." This

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* The following anecdote will make this clearer. A priest was tried by Lord Mansfield on the charge of having celebrated mass in England. This, under some old statute not then rescinded, was a crime punishable with death or transportation. The fact was proved, the prosecutor was already anticipating his triumph, but, to his great surprise, and to the general satisfaction of the public, the prisoner was acquitted, because, though it was proved he had celebrated mass, it was not proved he was a priest. If he could have been interrogated on that point, his conscience would not have permitted him to deny the truth, and he could only have been saved by an act of grace.

would not be intelligible but Beccaria explains; "it is to require from a man that he should hate himself and act as if he was his own enemy." This objection however is included in those already refuted. A man feels a very natural repugnance to accuse himself, and so he does to be accused by others, or to undergo the punishment to which he may be sentenced. If his repugnance be not attended to in one case, why should this be done in the other?

Others say that a personal examination is not generous, that it subjects a prisoner to a kind of mental torture. He is in an unhappy situation, the Judge should be his friend rather than his enemy, and should not take advantage of what may escape him against himself.

Such notions would almost appear to have been derived from the code of modern duelling, or prize-fighting. It is against the rules to press an adversary whom some accident has disabled, or to strike a man on the ground: he must be allowed to rise and begin the fight again.

These ideas, of pity and generosity, always deserve to be treated with respect when they are not in opposition to the higher principle of benevolence, which looks to the general interests of society. When a criminal is acquitted, the punishment which he thus escapes falls as it were on society; not only the general morality of society depends in great measure on insuring, as much as possible consistently with the principle of security, the conviction of every criminal, but several innocent persons will, in consequence of the injudicious acquittal, be exposed to suffer injury, either from the same individual or from those whom his impunity is likely to encourage. The most humane, the kindest Judge, is no more a *friend* than he is an *enemy* to those who appear before him under a criminal charge; he is only the friend of truth and the laws. He neither seeks for an innocent man nor for a criminal; he only seeks for truth.*

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* The examination of a prisoner put on his trial has sometimes, on the Continent, led to an abuse which has been quoted in justification of the English practice. A Judge, irritated by the denials and evasions of the prisoner, fatigues him with captious questions, intimidates him, and perhaps from wounded vanity engages in a struggle where he must more or less lose his impartiality.

This however is merely a gross error of the Judge. The object is not to obtain a confession, but merely to ask for explanations which may assist the Court in the investigation of the case. If the prisoner chooses to re-

IX. May a Counsel be called upon to reveal any facts which might be injurious to his client?

Yes. No evil can apparently result from such a practice, unless it be, on the whole, an evil that a man should suffer the punishment he has deserved. No innocent client can be injured by the examination of his Counsel; the former having committed no offence and not contemplating to deceive the Court, the latter has nothing to confess.

But it will be objected that if such a principle should be admitted, there would no longer be any Counsels. A person under a criminal charge would have round him none but police agents whom he could not trust.

This objection, however, is obviously applicable only to the case where the prisoner is really guilty. What then would be the evil of his being unable to tell his lawyer "I did really rob (or murder) that "man, let me then entreat you to lend me the assistance of your legal "knowledge and experience, to evade the ends of the law, to escape "the punishment it awards to my crime, and to be let loose again on "society with all the privileges of an innocent man." Under the operation of the principle above adverted to, a criminal could not have the assistance of an able and upright lawyer to deceive the Court, he must either endeavour to deceive him first of all, or if he could not do so the Counsel, after stating to the Court what took place between him and the prisoner, could only, if he had received the confession of the criminal, plead in mitigation of punishment; or, if he had not received any confession but entertained suspicions of his guilt, would naturally confine himself to pointing out the reasons which might throw any doubt on his culpability. The only rational object which the legislator can have in allowing a Counsel to prisoners, is to prevent the condemnation of the innocent, he cannot wish to favour the escape of the guilty.

The lawyer who makes use of his superior talents and knowledge to find means of evading the law, of saving his client from the punishment he has deserved, and obtaining for him a judicial triumph,

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fuse replying to the questions put to him by the Judge, he is perfectly free to do so, though it would of course, except under special circumstances, produce a presumption against him, because the instances are few in which it is possible that an innocent person should adopt such a line of conduct

is a kind of accessory to the offence committed. Common accomplices, who are generally under the influence of strong passions and unhappy circumstances, are liable to the penalties of the law, but a lawyer, acting coolly and deliberately without the least regard to truth and justice, is allowed to inflict on society the greatest injury which can result from the conduct of an accessory after the fact.

CHAPTER IV.

OF PRE-ESTABLISHED PROOFS.

1. *Registration of Marriages and Deaths.*—2. *Contracts.*—3. *Public Acts.*—4. *Verbal Processes.*—5. *Registration of Copies.*

A Pre-established Proof is that, the creation and preservation of which have been ordered by the law, previously to the existence of a right and obligation, so that the exhibition of that proof will be necessary for the permanency of that right and obligation.

The right of property to moveables, such as food, clothes, furniture, is in general sufficiently established by possession alone, without any documentary titles; but it is otherwise with regard to real or immoveable property. In the latter case the right of the proprietor must be secured by some permanent and authentic document.

It may appear at first sight, that the person who wants to obtain and preserve a right, is the only one interested in the preservation of the document which establishes it. But by examining the subject more carefully, it is soon perceived that there are several circumstances, in which others are called upon to share in those precautions with the person chiefly concerned, or even to undertake the duty for him. For instance, if he is a minor, if he is absent, or if the right in question concerns many persons. In this latter case, if each partner had to establish his right separately, the expense and trouble of doing so might altogether annihilate its value.

Another circumstance would alone suffice not to leave solely to the possessor the care of preserving the proofs of his right. If that right be attacked, a hand more powerful than his is necessary to protect and maintain it; this can only be the interference of the Judge acting in conformity to the orders of the legislator.

Thus it belongs to the legislator to determine, not only what are the rights to which he is willing to give his sanction, but also what are the proofs he requires to establish their existence.

The proofs thus preserved are useful to decide lawsuits, and still more so to prevent them. They are also of use for occasional reference in cases indirectly connected with them, and for the preparation of statistical documents.

What is to be done by the law with regard to Pre-established Proofs?

The law has three different objects to attend to with regard to those proofs.

1st. To establish them in all cases where their utility is not doubtful.

2nd. To adapt them in every case to the service expected from them.

3rd. To institute means to establish their publicity in the interest of a third party.

The importance of written proofs is such that it has in some instances been considered to sanction the total exclusion of oral testimony.* When this is done, that is, when the law of some countries, refuses to recognize any contracts of importance but those which have been duly recorded in writing, the object is not to restrain the liberty of the contracting parties, but only to prevent the disputes and evils likely to follow the unsatisfactory vagueness of conventions, which, with their clauses and conditions, exist only in the fallible and uncertain memory of man. When a contract is written, and duly copied in a public register, its existence is secured, and at any time any disputes between the parties, or any doubt which one of them may experience with regard to some of its clauses, may be put an end to by a reference to the written document.

The system of Proofs may be applied to all facts which have a legal importance, such as: 1st. Deaths and Marriages; 2nd. All kinds of Contracts; 3rdly. All Public Acts in the Judicial, Executive and Legislative Departments; 4thly. Verbal Processes, that is, the recording, as soon as possible after a fact has happened, of all the circumstances which can then be ascertained with regard to that fact; 5thly. Copies of deeds.

1. The importance of registering the dates of births, marriages, and deaths, is so obvious that one cannot help wondering that this

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* Upon this Vide Book II. Chapter II. No. V

should, among highly civilized nations, be still left in great measure to the caprice of individuals. How often may not oral testimony, from the absence or death of witnesses, or many other reasons, be totally unfit to certify a fact upon which the question of a disputed succession depends, and which would easily have been ascertained from a public register properly kept? In England, registers of this kind are kept by the ministers of the Church for those of their own persuasion, but the dissenters are left to manage this for themselves as they can. France has given the best example of the practice here adverted to. The public registers of births, marriages and deaths, are in that country entrusted to the charge of the Magistrates.

2. Two things are necessary to give to contracts all the strength which results from a Pre-established Proof: 1st. special forms according to which they should be recorded; 2ndly. provisions made for the observation of those forms.

The object of special forms to which the greatest possible publicity is given, is to prevent fraud or falsification. For instance, contracts may be required to be recorded on stamp paper which is sold by a public officer, and on which the date of the sale is stated. This would prevent the possibility of antedating a contract. Thus a man, who for a loan of money equal in value to his property, mortgaged last year that property to his creditor, and has not paid off his debt, could not again mortgage it this year to another person by antedating the deed. This would be particularly the case if every stamp paper could be used only within a certain period from its purchase, so that at the time of the first mortgage, or before that, the mortgager could not, in anticipation of another transfer of his right at some future date, have provided himself with a spare stamp.

The law may also order that certain words be used in the contract, so as to prevent as much as possible all mistakes as to its meaning, and that it be signed before two or more witnesses, or in the presence of a public officer, who shall attest it by their signatures. To this may be added the copying of the said contract in a public register for fear the original document should be lost or destroyed.

The first means to insure the observance of the legal forms, consists in the *suspicion* which would naturally attach to all contracts not drawn up according to the forms in question, supposing those forms to have been well known and no unusual circumstances to have

prevented their adoption. In such a case it belongs to the parties to explain their reasons for not conforming to the usual and regular practice, and if they fail to satisfy the Judge on this point, the contract should be held invalid.

Another mode of insuring the observance of the forms prescribed by the law, is to annul all contracts not conformable to them.

The first means is as proper as the second is objectionable. If the annulling of a contract, merely for want of form, be just, it is only when that informality is such as to constitute a certain proof of dishonesty on the part of the parties. But what can be thought of the invariable application of that principle of *nullity*, in cases where the informality alluded to clearly proves no such thing, when it can be established beyond a doubt that the parties were ignorant of the necessity of the forms in question, or for some special and good reason could not conform to them? An unbending principle of nullity in such cases is either useless or unjust: it is *useless* when sufficient reasons exist to condemn the contract as fraudulent; or *unjust* if no such reasons exist.

The non observance of the required forms is particularly suspicious with reference to Wills, although, with regard to those documents, there are cases in which these forms sometimes cannot be observed, for instance, at sea, during a campaign, &c.

An official paper, intended for the preparation of testaments, should contain in the margin all the instructions, rules, or references which may enable the testator to draw up his Will so as to secure it against all suspicion and erroneous interpretation.

The various offices in the administrative, legislative, and judicial departments, where all proceedings are recorded, contain collections of Pre-established Proofs with regard to all that concerns them. Here three points deserve consideration.

1st. What are in each case the use of those proofs?

2d. How far can they be trusted to?

3d. How can they be rendered more perfect?

The recording of authentic documents in the instances alluded to, has for its direct object the convenience of the heads of departments, of their subordinates, and of all those who have business to transact with those departments. It is impossible to imagine an administration of some extent without registers.

Independently of these direct advantages, the preservation of those documents is useful for judicial purposes, as when the Judge, on the occasion of some lawsuit, finds in them facts bearing on the point at issue between the parties; or for the preparation of statistical statements which furnish important grounds for administration and legislation.

The credibility of those documents rests on the great responsibility of those who prepare them, and on the presumption of their impartiality.

The best mode of increasing the advantage of the proofs alluded to, is to improve the system of registering them. The object should be to record under distinct heads all the acts of each department, to exhibit the relation of each part to the whole, to state separately each expense with the object for which it was incurred, to show the pay and duties of each officer and the manner in which he fulfils those duties. If besides this, the registers are open to the inspection of the public, it is not likely that any gross errors or irregularities in those registers can long escape discovery.

4. Verbal Processes are statements written on the spot, to certify facts having a legal importance.

Whatever is confined to conversations, or words spoken, is liable, after a very short time, to be forgotten or misrepresented; this can be prevented only by giving a permanent shape to those words at the time they are uttered.

The credibility of a Verbal Process chiefly depends on the character of the person who has written it. This duty is in general entrusted to public officers, although, in their absence, any private individual may in this respect fill up their place. Here, as in other cases, the principle of suspicion should be preferred to that of exclusion. A Verbal Process is not necessarily false because it was drawn up by a private person, but, generally, this circumstance will render it liable to suspicion, if no satisfactory reasons can be shown for this departure from the usual practice: a suspicion may, however, be altogether removed by positive proof that it is groundless.

5. Registration of Copies. A measure of great importance with regard to contracts is that which directs their being copied in a public register. This not only secures the interested parties against any accident which may happen to the original documents, but is also ex-

tremely useful to creditors and purchasers, who are interested in preserving themselves from any fraudulent act, by which the property, upon which they have acquired a right, should be secretly transferred from one person to another.

This measure may be applied to any kind of agreements, or contracts, on the application of the parties, but the registering of a document should be made obligatory only when it may be of importance to a third party to know its contents, and when its publicity is necessary to prevent fraud. Where however that obligation is imposed, the mere non registering of a contract should not render it null and void but only make it suspicious.*

To secure the advantages of a regular register of contracts, it should be within the reach of all, open to any one who might wish to examine any part of it; and it should have an alphabetical index which would render a reference to it as easy as possible.

The objection, made against registers of this description, that they allow a man to pry into the secrets of his neighbours, might in great measure be removed by directing that every person who wishes to consult the register, shall state in writing the object and reason of his inquiry. The officer in charge of the register might then himself ascertain the particulars required, and, either give his certificate to that effect, or allow the applicant to verify the truth of the same in the book open for that purpose at the necessary places, without giving him that book to peruse throughout at his leisure.

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* The non registering of a mortgage deed should make it null and void, so far as it stood in the way of the holder of a more regular deed obtaining his right; but, with regard to the immediate parties to it, the non registering of the mortgage could only make it suspicious, and the mortgagee should be allowed to bring forward proofs of its genuineness, or correctness, if either were denied by the mortgager.

CHAPTER V.

OF CIRCUMSTANTIAL EVIDENCE.

1. *General remarks.* 2. *Circumstantial Evidence from confessions out of Court;* 3. *from the appearance and conduct of an individual after the offence;* 4. *from the existence or absence of motives.* 5. *General rules with regard to Circumstantial Evidence.*

A direct proof consists in the production of a document immediately connected with the question at issue, as the authentic copy of a contract the existence of which had been denied; or in the deposition of a witness to the *main* fact to be established, purely and simply stating what he knows through the testimony of his own senses, without, as much as possible, mixing up with this any inference from his own judgment.

Circumstantial proofs are those which are inferred from the existence of some fact or facts, having some apparent connection with the *main fact*, and tending to establish its existence.

The door of a house has been forced open and a sum of money in gold has been carried off, the state of the lock and some marks of violence show that the door was forced open from the outside; shoes which belong to none of the inmates of the house are found on the staircase; a shoe-maker of the neighbourhood recognizes them as having been sold by him to a man who used to work in the village and has disappeared; some of the articles stolen from the house, have been found on the road leading to an inn where the owner of the shoes stopt the day he left the village, and changed a gold coin, &c. Here are a number of facts tending to prove that the person alluded to was the author of the theft.

With regard to the main fact, a single *direct* proof is generally, according to the English Law, when no objection exists to the credibility of the witness, considered as sufficient to produce conviction, but in very few cases would a single circumstantial proof answer the same purpose. If however several circumstantial proofs existed simultane-

ously, and each strengthening the other, their combination might lead to the main fact being considered as fully established, although each circumstance, when separately considered, was only a probability.

Some circumstantial facts tend to increase the probability of the main fact, while others on the contrary tend to decrease it. The former may be called *corroborative*, and the latter *infirmative* facts.

Judicial logic consists in making a true valuation of these two classes of facts. An error in that valuation may lead to an act of injustice. If in the case of an offence a single *corroborative* fact be omitted, or not appreciated to its full value, the offender may escape the punishment due to his offence; if, on the contrary, the fact not properly appreciated be *infirmative*, an innocent man may be convicted and punished.

The prosecution of a trial consists in proving the facts which constitute the offence, but the *infirmative* circumstances are more liable to escape attention, and too many instances might be quoted in which they were entirely lost sight of.

A man has been found dead in his room, and it appears he died from a deep wound inflicted with a sword; another man was seen, immediately before, running out of that room holding a sword covered with blood. Although no one may have seen the act actually committed, the circumstantial evidence, tending to convict of murder the latter person, is very strong, but still there might be *infirmative* facts which would make the probability greatly preponderate in favour of his innocence. He was, for instance, a man of very mild and benevolent disposition, a great friend to the deceased by whose death he loses an affectionate and generous protector. The latter had been for sometime in a gloomy state of mind, the supposed murderer affirms he found him just in the act of committing suicide, and snatched his sword from him, &c.

Like oral evidence *real* proofs are liable to be deceitful. A knife bearing the name of Junius is found in the heart of a murdered man, but it may be that the murderer stole that knife from Junius, with the view of producing a circumstantial proof against the latter, and thus securing himself against suspicion.

A *real* proof may be also falsified by a third party, or by the very person against whom it is brought forward, and who, finding himself from some accidental circumstance liable to suspicion, does not trust

to his own innocence, but from a feeling of caution denies, or endeavours to alter, the circumstantial fact in question.

Accident may produce the same effect. For instance, in the following case the facts upon which the circumstantial evidence is grounded are clear beyond a doubt, but their apparent connection with the main fact or offence is merely accidental. A magpie had accumulated some silver coins in the trunk of a maid servant. The money was missed, a search instituted, and on the coins being found the poor servant was sentenced to death and executed. Silver coins however continued to be stolen, and the bird was seen putting them into the same trunk through a hole which had not been remarked before.

The direct examination of the accused person and of the witnesses by the Judge, furnishes a powerful means of appreciating the degree of credibility which a circumstantial proof may deserve.

There are cases in which a criminal act is clearly proved against an individual, though some infirmative circumstances may still operate in his favor.

A, intending merely to inflict a severe chastisement on B, has killed him. In this instance A is fully guilty of the act of violence he intended to commit on B, but, with regard to the accidental result which it appears from circumstantial evidence that he never contemplated, his guilt admits of extenuation.

A had prepared some mixture with which he intended to poison B. It appears however he had altered his mind and did not give the poisoned mixture to B, but the latter through some accident drank it off and died. Two or three men engage in a robbery: one of them in the execution of the act commits a murder which it is clearly established had not been contemplated by the others. In these and other similar instances where an offence has been committed, the degree of criminality may be materially modified by peculiar circumstances.

In times of comparative ignorance the attention of the legislator is limited to the physical fact; he altogether neglects to consider, or cannot distinguish, the different degrees of intention. Chinese laws make no difference between a voluntary or an involuntary homicide. When Europeans have been the victims of that rude jurisprudence, they have loudly complained of its barbarity, but in many cases their own laws show very nearly the same disregard for differences in the degree of criminality.

It is important to attend to infirmative facts, with regard to preparations apparently made for the commission of a crime, or to declarations of intention, or menaces. Those preparations may not have been intended for the purpose attributed to the suspected person, or he may have altered his mind; although, in a moment of irritation, or with the view of creating alarm in the mind of his enemy, he stated before a third party that he would shoot him, or threatened him to his face with assassination, it does not necessarily follow that he really intended to murder him, that he persevered in that intention and carried it into effect. Men often give utterance to words which it would be unfair to interpret as expressing their true and deliberate intention. Besides, from *intention* to *execution* there is still time for reflection and repentance.

A man who had been threatened with assassination has been murdered. The person who threatened him and who is naturally suspected of the murder, may say: "It is true that I threatened him, but "my intention was to frighten him and nothing more. If I had in-"tended really to murder him, is it probable that I should have put "him on his guard, and thus done the very thing calculated to pre-"vent the carrying of my intentions into effect?"

This consideration is important, but of course it must not be urged as conclusive. Criminal threats are but too often realized. They at least prove a feeling from which it is not improbable that the act threatened should follow.

II. Circumstantial Evidence drawn from confessions out of Court.

When a person is really guilty, it seems the best thing he could do would be to hold his tongue. If he speaks however, it is generally because he perceives or supposes that suspicions are already entertained, and he endeavours by his discourse to remove them. He does not remain silent among those who speak of the fact in question, he himself alludes to it with affected indifference, and mixing truth with falsehood, he inadvertently states in his conversations circumstances which could be known to the offender alone, and which thus immediately betray him.

Self conviction may result from different causes, such as mere indiscretion, accident, confidence afterwards betrayed, letters to an accomplice, boasting, anxiety to remove suspicions, repentance, or remorse. It may also be the effect of superior interest, as when a man

acknowledges himself guilty of a crime to escape being convicted of another, or to shelter the real criminal from whom he expects a large reward, which will be more than an adequate compensation for the punishment he may thus incur.

The infirmative considerations, which may apply to proofs thus obtained, are these: the testimony may have been misunderstood, it may be incomplete, or false. It is possible that the person suspected and whose expressions are thought sufficient to convict him, alluded to some other fact, or was not speaking seriously but merely in jest; or the circumstance mentioned had no connection whatever with the offence, and might easily have been explained. Besides, the pretended confession may have been a false self-accusation. It is certainly not common for a man falsely to accuse himself, but this may be done from disgust of life, and in case of a crime usually visited with capital punishment choosing that kind of suicide in preference to another; from unsoundness of mind, or illusion as in cases of witchcraft, &c.; from a wish to shelter the true criminal, or obtain any other object by a self sacrifice, &c.

The above considerations tending to counteract the inference from a confession out of Court, are also applicable to confessions in Court, although the misinterpretation and incompleteness of the confession are not so likely in the latter as in the former case, since the examination of the accused person will in general elicit all the explanations which may be required.

III. Circumstantial Evidence derived from the appearance and conduct of an individual after the offence has been committed.

The conduct of a prisoner during his examination, or previous to it, may furnish circumstantial evidence against him. He blushes, grows pale, hesitates in his replies, and trembles. These symptoms may however be the result of timidity without implying any criminality whatever. Sometimes an attempt to deny a fact which has an apparent connection with the offence and which is clearly proved, or to remove or destroy some criminative proof, may induce a strong suspicion against the person who does this. Such circumstantial proofs, however, are rendered weaker by a consideration of what the feeling of self-defence may inspire. If an innocent man perceives that from the peculiarity of his position, he is likely to be suspected of a crime which has just been committed, he may perhaps endeavour to remove

some appearances which would tend to produce the suspicion he fears.

A murderer, with a view to save himself from suspicion or out of revenge, conceals his murderous weapon, still covered with blood, in the house of another person. The latter discovers it and transfers it to some other place. Such a circumstance would naturally tend to criminate him, unless some other circumstances made it appear that he was innocent, and led to the discovery of the real criminal.

The fear of being condemned on fallacious appearances may lead further. It may induce a man to hide himself, or to go to a foreign country; to falsify the proofs which would criminate him, or even to suborn witnesses to give false evidence tending to exculpate him. He may also suppress proofs, or remove a witness. The infirmative consideration in all these cases, is that the person in question may have been anxious to avoid the vexations of a criminal trial, and the chances of an erroneous condemnation. He may also have had reason to suppose that some adverse party would use against him unfair means, which it would be easier to meet by means of a similar nature than by an open and honest defence.

IV. Circumstantial Evidence derived from the *existence* or *absence* of motives.

A circumstantial proof is naturally derived from the existence or absence of motives. A man is murdered and one of his neighbours, who was last seen in his society, is suspected to be the murderer.

But then comes the question, what motive sufficiently strong could have induced him to commit such a crime? Was it from revenge, or for purposes of robbery? Or, if the suspected person be the legal heir of the murdered man, was it to secure and hasten his inheritance?

It is clear however that mere ill will, or the wish to obtain a succession, cannot *alone* be considered as *strong* presumptions against an individual of tolerably good character. From such ill will, or the wish of obtaining a succession long expected, to deliberate murder, the distance is immense. The natural disposition and the character of the person inculpated, are in such a case important considerations to be attended to.

V. General rules with regard to circumstantial evidence.

1. To determine whether, with regard to the main fact, a circum-

stantial proof is conclusive or not, it is necessary to examine all the infirmative suppositions which apply to it.

2. Any circumstantial proof being a fact on which an inference is grounded, that fact should itself be clearly and fully established. A had been murdered and B is accused of being his murderer; he was seen, covered with blood and early in the morning after the night of the murder, at a short distance from the place where the body of the murdered man was discovered; he has suddenly left the village, he changed his dress in an old clothes shop, and in his cast off clothes was found a knife which answers to the description of the instrument with which the wound from which A died, must have been inflicted. Here are several facts which lead to the inference that B is the murderer of A, but it is evident that this conclusion can be legitimate only on the supposition that those facts are well established.

3. Every circumstantial proof resting on a fact accessory to the main fact, the latter should be fully and directly proved. In the instance just quoted the accessory facts were the sudden departure of B, the blood seen on his coat, the knife which he appears to have had in his possession. The main fact is A's murder, whose body has been found with one or more wounds inflicted with a knife or some similar instrument. It is clear that without the main fact the others are nothing. The former must therefore be first established by clear evidence.

4. The circumstantial facts may be directly connected with the main fact, or that connection may exist only through the medium of other facts. Thus, for instance, the blood seen on the hands or clothes of B at the time A was murdered, is a fact which appears directly connected with that murder; but the selling of his clothes by B has no apparent connection with that crime, unless the clothes were sold either the same day or the day after, and stains of blood were found upon them, or in consequence of the knife found in them agreeing in shape and size with the wounds inflicted on A. It is essential that the person who brings forward circumstantial proofs, should connect the links of the chain, so that the first, starting from the main fact, is connected with the last link without interruption.

CHAPTER VI.

OF INFERIOR PROOFS.

1 *Non-Judicial.* 2. *Borrowed.* 3. *Non-original Proofs.*

Inferior proofs consist of facts the correctness and completeness of which cannot be tested with the same certainty as other evidence. These proofs may be divided into: 1st. Non-Judicial; 2dly. Borrowed; and 3dly. Non-original proofs.

Non-Judicial proofs are derived from casual writings as notes, letters, &c. or commercial books.

The dependance which may be placed on proofs derived from notes and letters, varies according to circumstances and the improbability of any fraud or collusion.

The proofs which are grounded on entries in commercial books, are in general more to be trusted than the former, in consequence of the regularity and care with which those books are written, and the greater difficulty of preparing such a proof for a fraudulent purpose.

2. A *Borrowed* proof consists in bringing forward copy of a testimony delivered, of a document admitted, or a decree given, in some other case, which testimony, document or decree, has some reference to the question now at issue. The value of this proof depends entirely on circumstances. Was it properly examined and deliberately admitted? Was it of any importance to the case in question? Does the Court which admitted it deserve any great degree of confidence? Was there no collusion? All these questions must be attended to. For instance: A sues B for 10,000 Rupees he lent to him last year, and which ought to have been repaid at the end of six months. B delays the decision of the suit as long as he can, and in the mean time gets a friend of his to lodge a complaint against him for a sum equal to the whole of his fortune. The friend presents to the Court a false bond, which A however acknowledges to be correct, and thus the former gets a decree in execution of which he seizes the whole of A's property, which it is understood between them he will keep for him.

It is in vain that B afterwards gets a decree for his 10,000 Rupees, since the whole of A's property has been disposed of. It is clear that in such a case the grounds of the first decree should on the application of B be open to a re-investigation. They consisted in the assumed correctness of a bond which in reality was false, but the truth of which the Court admitted because the defendant did not deny it.

3. *Non-original* proofs are proofs founded on hearsay, or mere copies of some supposed original documents not forthcoming, or consist of the written evidence of an absent witness, or of oral evidence relating to the existence and contents of some documents not brought forward.

In every *non-original* proof, there are at least two persons upon whom its value depends, and as each may have been mistaken, or may have wished to deceive, the probability of the fact in support of which it is brought forth, is naturally weakened. A declares that he heard B say he had seen C murdering D. A however may have misunderstood what he heard, or he may knowingly tell an untruth; supposing however his evidence to be true so far as he is concerned, still the correctness of the imputation on C depends on the truth of B's assertion, which may possibly have been the result of an error, or of downright and deliberate calumny, such as a cross examination, if possible, would have clearly exposed.

Proofs of the above description should only be admitted when no other can be obtained. A due recollection of their inferiority will tend in great degree to diminish the danger of admitting them. It is evident that the value of a non-original proof decreases as it is removed further from its source. If the evidence of a first copy, or that of a witness who merely relates what he has heard from one supposed to have had a direct and personal knowledge of a certain fact, be inferior to direct evidence, it is clear that the copy of a copy or a repetition at second hand of a hearsay, must be considered as still less satisfactory than the first copy, or the statement of the person who heard the fact from the supposed original witness, would have been. The third copy or the third witness from the original one, is again less satisfactory than the preceding one and so on.

With regard to copies *duly authenticated* the above reasoning is not applicable. Although, strictly speaking, not quite so trustworthy as the original, they cannot be considered as inferior proofs.

CHAPTER VII.

1. OF THE PRODUCTION OF EVIDENCE. 2. ATTENDANCE AND EXPENSE OF WITNESSES. 3. OF TORTURE. 4. OF ANONYMOUS INFORMATIONS. 5. OF THE PRESERVATION OF EVIDENCE.

1. Production of Evidence.*

The production of a proof in a Court of Justice requires: 1st. that the person or thing which is to furnish that proof should be found out; 2ndly. that that thing or person should be brought into the presence of the Judge; and 3rdly. that the proof in question should be furnished by the thing or person alluded to.

The party who wants to produce a certain proof in Court, knows in general where it is to be found, all that he requires is the power to bring it forward. The power which the legislator can confer for that purpose may consist merely in a simple invitation, or in the promise of certain rewards, or the threat of certain punishments. Instead of this, or in addition to this, a right of search in a house or a public office may be given; a local investigation, the summoning or detaining of a witness, &c. may be ordered. Whatever may be the powers given by the law for the production of evidence in any particular instance, the fundamental principle of Utility should not be lost sight of. No process from which vexation, trouble and expense must necessarily follow, should be granted unless the advantage expected from it be much greater than the evil it is likely to occasion. The easy production of evidence depends in great measure on the organization of the Courts, and particularly their general permanency, their visits to places within their jurisdiction, but at a distance from their usual station, when a local investigation may be required; and lastly, their authority to follow any indication of a series of proofs relating to material circumstances connected with a case under investigation.

* The question relative to the party on whom falls the duty of proving *his* side of the question, has been treated of in the first Chapter of the present book.

2. Attendance and Expenses of Witnesses.

The attendance of a witness, entailing always more or less trouble upon him, should not be required, except on the solemn declaration of one of the parties that his evidence is necessary. If the witness neglects to attend, he should be liable to a fine superior in amount to the profit which may be derived from his absence, or be liable to an action for damages; or the Judge should have the power to order him to be brought by force. When a witness comes to attend a Court of Justice, or returns from giving his evidence, he should not be liable to be arrested for debt. This is important to facilitate the production of proofs.

If a witness be not able to attend, either from the great distance at which he is, or from illness, a commission should be named to examine him; to that commission a number of written questions should be delivered, and the witness' written replies should be returned duly signed, witnessed and sealed.

A witness should not be detained when sufficient security is tendered for his appearance at the proper time; and if it be thought necessary to detain him, this should be done, not in the jail, but in a house adopted for that purpose, and with which no idea of penalty or disgrace is connected.

The expenses of witnesses, give rise to several intricate questions. 1st. Should the witness who can afford it be left to bear his own expenses? Or if he cannot do so, on whom should the burden fall; on the party who summoned him, or the party cast, or the public? Should the amount of expenses allowed be regulated by the circumstances of the witness, or that of the party who is to pay them? Should any difference be made between Civil and Criminal cases? &c. &c.

All these questions and many others should be provided for, but in determining them, the legislator must still leave much to the discretion of the Judge.*

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* It is desirable to deal with witnesses so as to obviate, as much as possible, the reluctance which men have in general to be called upon to give evidence in a Court of Justice. For this it seems that the least which can be done, is to make good to them any expenses which they necessarily incur to come to the Court. This is particularly the case with witnesses of small income, day labourers, &c. In a Civil suit each party will naturally support his witnesses, and on the decision of the suit, a rough estimate of

It is in some cases necessary to offer a reward to induce witnesses to come forward. This is done, for instance, when a crime has been committed by some persons unknown, and a reward is offered for their discovery.

To this mode of procuring evidence it may be objected that it is not unlikely to bring forward false witnesses. Besides, when the reward is offered to accomplices as well as to others, it must be accompanied with pardon, otherwise it would be useless, and thus in obtaining evidence against one criminal another must be allowed to remain loose on society. These objections, however, are not sufficient to overbalance the advantage of the practice alluded to. No doubt that the evidence which is given only under the promise of a reward, is suspicious, but this very reason prevents it from being dangerous. The Judge, aware of the motive under the influence of which the witness is acting, is not likely to trust implicitly to his testimony. The pardon promised to a criminal who discovers his accomplices, although in some respect objectionable, has the advantage of procuring a conviction which probably would not otherwise have taken place, and thus, by the punishment inflicted, and the example given of the little reliance which criminals can have on each other, creates a wholesome fear among those who might otherwise be tempted to imitate them. The criminal to whom a pardon has been given, will generally cease to be a man dangerous to the peace of society. He is well known, the police may be directed not to lose sight of him, and he knows very well that, comparatively, very slight evidence would be thought sufficient to convict him. Besides, where the crime committed is one of a very heinous nature, it is not absolutely necessary that the pardon promised with the reward, should consist in any thing more than the exemption from capital or other corporal punishment, with a restricted liberty, or liberty under surveillance.

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the expenses of each particular witness being made by the Judge, the aggregate amount will be decreed against the party cast. If the latter cannot pay, it would apparently be better that, in the case of poor witnesses, the State should bear the expense than leave it to be borne by the unfortunate witnesses themselves, or the party injured. A Criminal case does not differ in this respect from a Civil suit, except perhaps that in *all* such instances witnesses should, previous to the sentence of the Judge, be supported by the State. The party convicted would afterwards be liable to refund the amount thus advanced.

If the witness, once in attendance, refuses to give his evidence, what is to be done?

If that witness be personally interested in the case, he is, like one of the parties to the suit, under the power of the law; his silence would of course injure his cause as it would naturally be interpreted against him. If, on the contrary, the witness be not at all concerned in the suit, it is not likely he would decline to declare what he knows. Any witness, however, who refuses to depose to a fact which is certainly within his knowledge, is guilty of a contempt of Court for which the Judge might, with the permission of the superior Court, be allowed to keep him in solitary confinement, until he may be pleased to speak out, or for a specified period according to circumstances. When the procedure is public, and the reasons of such a confinement are publicly expressed, this authority given to a Judge would hardly be liable to abuse, although, however, the evidence thus obtained must no doubt be received with some suspicion.

3. Of Torture.

It is not necessary to say much here about the use of torture, an absurd and cruel practice which no longer disgraces the jurisprudence of European nations.

Judicial torture consisted in the infliction of some bodily pain,* which went on increasing until the sufferer agreed to do what was required of him, or until he fainted and a further infliction was declared to endanger his life.

The infliction of torture took place under several circumstances.

1st. When a man was strongly suspected of a crime, he was tortured to make him confess his guilt.

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* There were different kinds of torture. 1st. The *Rack*, which consisted of a large open frame of wood under which the criminal was placed; by means of ropes attached to his wrists and ankles, and by rollers at the end of the frame, his body was gradually lifted up within the frame, and, if his answers continued to be unsatisfactory, the rollers were further turned, and the sufferer stretched till his bones started from their sockets. 2nd. The *Svarenger's Daughter* was a broad hoop of iron, within which the body of the victim was compressed to such a degree, that the blood started from his nostrils and sometimes from his hands and feet. There were besides *Iron Gauntlets*, for the compression of the wrists by means of screws; *Spanish Boots* for the compression of the legs, &c.

2ndly. In other instances torture was inflicted on a criminal after his conviction, with the same view as in the above case.

3rdly. A criminal was tortured after his conviction to make him declare his accomplices.

In the first instance above stated, the unfortunate man subjected to the atrocious infliction of torture might be perfectly innocent, and the idea of the sufferings which he might notwithstanding be made to undergo, makes one shudder. But that is not all. If not endowed with strong nerves and more than ordinary energy, the chance was that, though innocent, he would, under the operation of the rack, to put an end to his sufferings, acknowledge himself guilty.

In the second case alluded to, either the man was guilty or he was not. If duly convicted, there could be no adequate advantage in making him confess by torturing him. If his conviction was not considered perfectly satisfactory, what use could there be in making him confess a crime of which he was perhaps innocent? When a criminal is convicted on evidence which does not absolutely exclude all possibility of his being innocent, it may be desirable that he should confess his crime, but it is only on condition that he should do so voluntarily, since it is only then that his confession may be received with confidence. In the third case stated, the infliction of torture might not be considered so exceedingly absurd, but it is then equally shocking to humanity, and has on the spectators the debasing influence of other corporal punishments. Besides, the criminal may not have had any accomplices, and in that case the torture is altogether a useless act of cruelty; or if he had any, what certainty is there that a revelation thus obtained is conformable to truth? Instances might be quoted of a convicted criminal, put to the torture for the purpose here alluded to, instead of betraying his accomplices, giving out the names of the best friends of the person by whom the infliction had been ordered.

4. Anonymous Informations.

Some remarks were made in a former part of this volume,* on the advantage of receiving all anonymous informations, provided proper caution be used in acting upon them. An anonymous imputation against an individual is of course no proof whatever of his guilt, but

* Penal Code, Book IV. Chapter VI.

it may furnish a clue for his conviction if he is guilty, or otherwise lead to an inquiry which would establish his innocence. It depends entirely on circumstances whether, and how far, a public officer may be justified in acting, or in permitting a private person to act, on an information of the nature alluded to. If the charge be a serious one, if the danger be imminent, and the information bear every appearance of truth, then indeed a Magistrate may be justified in instituting an immediate inquiry, summoning witnesses, and taking any measures which the case appears to call for. Jurists have generally objected to anonymous informations, but it is with reference to countries where trials were carried on in secret. Wherever, on the contrary, the trial is public, where the statements of the anonymous informer cannot be admitted as evidence unless he comes forward in his own person, and repeats them in open Court on oath or solemn declaration, the practice adverted to cannot be considered as dangerous. It may on the contrary be extremely useful, as it may bring to light many instances of official corruption or tyranny, and other abuses, which without it would never have come to the knowledge of the proper authorities. The motives which induce a person to become an accuser are: Public spirit, general or special benevolence, antipathy, love of reputation, or vanity, and these may be counterbalanced by the fear of making one's-self enemies, by a feeling of timidity, or by love of ease. The facility with which anonymous information may be conveyed, does away in some measure with the counteracting influence of the two last considerations, and provided the man guilty of knowingly and wilfully making a false communication of this kind, be held liable to penalties similar to those enacted against perjury, a sufficient check would exist against thus conveying a calumnious imputation.

5. Preservation of Evidence.

The means necessary for the preservation of evidence, are in general the same as those which have already been explained with regard to its production. As soon as a proof has been brought forward and duly registered, all that was necessary for its preservation has been done. In general, nothing is better calculated to prevent the loss of any evidence, than an immediate inquiry and a system of procedure which avoids unnecessary delay.

There are instances in which special measures are necessary to prevent the loss of evidence. For instance:

Should there be any special reason to suppose that a proof will be lost if not immediately brought forward, the trial to which it refers, ought to be proceeded with before all others, independently of its order on the file. Or if this cannot be done, any other special measure should be adopted, which may secure as much as possible the proof in question. A witness dangerously ill should be examined at once; if he cannot be brought to the Court, the Court should either go to him, or appoint a commission to receive his evidence, &c.

BOOK III.

OF THE APPOINTMENT AND ORGANIZATION OF JUDICIAL COURTS.

CHAPTER I.

OF THE OBJECT OF A JUDICIAL ESTABLISHMENT.—OF THE NUMBER AND GEOGRAPHICAL SITUATION OF COURTS.—OF THEIR JURISDICTION WITH REGARD TO AMOUNT OF SUIT AND TO GEOGRAPHICAL BOUNDARIES.—OF VACATIONS.

THE same rules of procedure are, with perhaps a few modifications, applicable to every Court of Justice however constituted. But the regularity, promptitude, and facility with which justice is administered to a people, depend much on the organization of the Courts appointed for that purpose.

Before a judgment can be delivered, the case must pass through a regular trial, the rules of which may be more or less vexatious, expensive and dilatory. Without overlooking that the immediate object of the appointment of Courts of Justice is to obtain correct judgments, the collateral circumstances just noticed must be carefully attended to. The evils in question directly tend to contradict the ultimate end of a judicial establishment. If it be very expensive and troublesome to obtain justice, many will be compelled to submit to grievous wrongs, instead of obtaining a redress for which they cannot afford to pay.

The number of Courts to be appointed, is one of the first points which must be taken into consideration. It is clear that that number should be in proportion to the number of suits. If in a given place there are ten Courts constantly occupied, and, notwithstanding a simple system of procedure, suits are found to accumulate, the number of Courts is not sufficient.

Courts must also be multiplied with regard to distances, to save the parties from the trouble, loss of time and expense, attending a journey to a remote place. It would be desirable that no jurisdiction should extend more than eight or ten miles in any direction, so that the suitor, whose residence is most distant from the Court, might in a case of necessity come to that Court, see his suit disposed of, and return home the same day.

This principle of geographical centralization is the best adapted to the convenience of suitors, but it is liable in practice to great objections.

First: the great number of Judges who are thus required involves a heavy expense. and besides it may be difficult to obtain such a number of well qualified men. It is true, that with a good code of laws, the administration of justice will not generally be a difficult task, but still a more than ordinary degree of instruction, experience and talent, will sometimes be found necessary to unravel an intricate case, and decide between contradictory depositions. In nine cases out of ten, it may be that mere common sense would be sufficient to lead to a correct decision, but if one-tenth of the suits brought before a Judge require more than an average understanding to be properly decided, he must not be found disqualified to dispose of them. Another reason against multiplicity of Courts, is drawn from the influence of publicity, the advantage of which is both in proportion to the number and to the general intelligence, social rank, &c. of the individuals to which that publicity extends. In a small village there would not be a sufficient number of persons disposed to attend the sitting of the Court, capable of appreciating, and by their presence influencing, the conduct of the Judge. The geographical principle must accordingly, to a certain degree, give way to that of population, and it is better that a Court should not be exactly in the centre of its jurisdiction, if there be within its limits, but at some distance from that centre, a considerable city well adapted for its station.

With the exception of Martial Courts, Courts of commercial jurisdiction and ecclesiastical discipline, and representative assemblies acting in a judicial capacity, every other Court should have jurisdiction over all cases whatever. No separate Courts for trifling and important cases, for the trial of civil or criminal suits should be allowed. Such subdivisions produce innumerable evils: either the number of Courts

must be multiplied beyond what would otherwise be necessary, or the Courts must be placed at an immense distance from each other. In the former case the expense to the state is enormous, and some Courts are idle while others are overburdened; in the latter case suitors are put to extreme inconvenience, expense and delay. Besides, if there are subdivisions of jurisdiction, it will often happen that a case will be instituted in the wrong Court, and perhaps, after a long investigation, when the Court was prepared to come to a decision, it will have to dismiss the case and refer the parties to another tribunal. In addition to this, such divisions weaken the influence of publicity, by dividing the public attention which otherwise would be concentrated on one Court.

These great evils do not appear to be counterbalanced by a single advantage. A Judge, it may be said, whose attention has been entirely given to one kind of suits, will better understand the law concerning them, but this is not correct to any useful degree; all that appears to be true, is that a Judge who has spent his life in trying one set of cases will know little or nothing about others, that if he never tried any but civil suits he will be at a loss to conduct a criminal trial. If, however, a good lawyer be considered to have all the legal knowledge necessary to assist a suitor in *any* legal case, why should not that ability be found in a Judge which is expected in a member of the bar? Has not the former, on the contrary, the advantage of being assisted in the trial by the debates of the Counsels, while the latter have themselves no such assistance?

The most unfortunate application of this principle of subdivision, is that which fixes the jurisdiction of Courts with regard to the amount of the claim brought forward. Such a rule gives rise to doubts as to the jurisdiction of this or that Court, which doubts must be disposed of before proceeding to the trial of the suit. Besides, this limitation of jurisdiction, according to the sum in dispute, is grounded on an erroneous notion of importance, which has led to a comparative disregard of the cases actually and truly the most important.

To measure the importance* of a pecuniary suit by its nominal amount, is to fall into a dangerous error. The importance of a given

* Some remarks have already been made on this subject towards the end of Chapter VI. Book I.

sum with regard to any particular individual, is proportionate to the ratio of that sum to his fortune. If one man has an annual income of five hundred rupees, and another has five thousand rupees a year, a sum of one rupee is of ten times the importance to the former that it is to the latter. Perhaps the proportion is even more than that, the small sum may be required to supply the former with *necessaries*, while the large one has reference only to the *luxuries* of the latter. Strictly speaking, the importance of pecuniary suits is rather inversely as the amount in dispute; the poorer class being by far the most numerous, the number of suits for small sums is much greater than that of suits for a large amount; and the class which can least afford a pecuniary loss, or is least able to appeal from an unjust decision, is specially concerned in those cases.

Lawyers however have estimated the importance of cases according to a different standard; the most important being those best able to afford a rich harvest.* Hence has arisen a great difference in the mode of trying disputes for a large or a small amount; a *Regular*, that is, a dilatory and expensive process being reserved to the former, and a *Summary*, simple and prompt investigation, to the latter. It is fortunate for the poor to be thus favoured, but the advantage of summary decisions might be extended to all cases.

Besides giving to all Courts a competence including all kinds of causes, it would apparently be desirable to give them also, under certain circumstances, a common jurisdiction with regard to places. For instance, where both parties agree to it, they might be allowed to choose, between the Courts of the neighbouring districts, that which

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* It may be that this consideration has had some influence in England on the distinction alluded to, but in India, besides the very natural prejudice which Englishmen have in favour of the laws of their own country, it is probable that the greater importance attached by the Anglo-Indian law, to suits for a large amount than to those in which a trifling sum only is in dispute, is founded on the fact of the Judge being more liable to be tampered with in the former than in the latter. This fact is certainly undeniable, but it should not be forgotten that where on that account the temptation is greater, the check of publicity and appeal is greater also. The public attention is more occupied with a suit for a large sum than with one for a trifling amount, the former is also more likely to be appealed, and lastly the decision of the Judge if wrong is more apt to be suspected of having been *wilfully* so.

suited them best. Although the jurisdiction of each Court must, in ordinary cases, have territorial boundaries, there is no good reason why this should interfere with the wish of the parties themselves, to go before a Judge whose impartiality and justice they are more inclined to trust to; or why such transfers, from one district to another, should not be made, when the superior Court may order it from a conviction that, in consequence of some special circumstances, the object of justice will thus be better answered.

The system of Courts of Circuit, which go periodically to administer justice in each district within their jurisdiction, is considered to possess the following advantages:

1. Fewer Judges are necessary for the judicial administration of the country, and thus it is possible to obtain for the office men of first rate ability, and to give them high salaries, which, combined with their prominent station, increase their responsibility, and add to the confidence which the public is disposed to place in their decisions.

2. The Courts going to the suitors, the latter are thus saved the trouble of going to the Courts.

3. The Judges only passing through each station in their circuits, are not apt to fall under the influence of local prejudices, such as may bias the minds of stationary Judges.

These advantages of the system in question are undeniable, but they are more than counterbalanced by the objections which may be urged against it.

1st. The Circuit Judges remaining only for a few days at each station, any suit which may not be ready for investigation during one session must necessarily be delayed till the next.

2nd. The period which elapses from one session to another, cannot but produce innumerable incidents unfavourable to justice, particularly if the sessions are not held at very short intervals of time During the delay proofs vanish, witnesses leave the country or die, or are tampered with. Besides, the punishment of a criminal produces less impression from not immediately following the crime for which it is inflicted.

3rd. If in each district, the number of suits be such as would require the attention of one Judge from one end of the year to the other, it is impossible for a Circuit Judge in a few sessions to do justice to them.

In addition to this, the advantages first enumerated, although real, are not so great as they may at first appear. Even with a clear code of laws, and a rational system of procedure, a man of more than ordinary talent is still required as a Judge, but it is not necessary that he should be a man of genius. Any well educated man of sound sense and good character, is, after a few years' practice, qualified satisfactorily to administer justice in all cases. If three or four such Judges are appointed, one at each of the stations of the Circuit Judge, the argument drawn from the saving effected in the expenses of the suitors by carrying justice to their door, is of course done away with. As to the impartiality which the circuit system appears calculated specially to secure, the same object will be in general fully answered by publicity, and the efficient check of a Court of Appeal.

What shall we say of days of Vacation for the Courts? This is a rule which certainly was not made by suitors or for their benefit. It seems as if it were intended to give a truce to the most dangerous enemies of society. If a Judge wishes for a vacation let him furnish a proper substitute to do his work, and let not the interests of thousands be sacrificed to the convenience of a few well paid public officers. To suspend for a time the functions of the Courts, is apparently as absurd as it would be to allow holidays to Surgeons and Physicians. Scarcely a day can be lost without causing vexations, expenses and objectionable delays, and without exposing suitors to suffer an injustice from the death of a witness, or the loss of a proof. There are permanent proofs which may always be had, but how many others exist only temporarily, and soon disappear if not made use of immediately

CHAPTER II.

OF THE NUMBER, REMUNERATION, PROMOTION AND REMOVAL OF JUDGES. —OF THEIR CONDUCT UNDER CERTAIN CIRCUMSTANCES.

How many Judges should there be in a Court of Justice? Under the system of publicity and appeal, one Judge is not only as good as, but better than, several. This opinion which looks like a paradox is supported by the following reasons.

1. The plan of having only one Judge in each Court of Justice tends to promote all the qualities essential in a Judge, while the opposite system has quite a different tendency.

2. The honesty of a Judge (in so much as it is not solely the result of his moral and religious principles) depends on his responsibility at the tribunal of public opinion and before the laws of his country. That responsibility is never so great as in the case of a single Judge, who stands alone, without any other defence but the honesty of his decisions and the general esteem he has obtained. If he should be guilty of an act of injustice before so many witnesses interested in spreading the alarm, he would find himself alone exposed to universal indignation, with the sword of Justice hanging over his head Even should a Judge, under the circumstances alluded to, not be inclined to be honest, he would be so in spite of himself, his position being such that his interest is inseparable from his duty.

Instead of this, let us consider the case of a Court consisting of several Judges. The more numerous they are the less will they be dependent on public opinion, not only because the public blame will be divided among them, but because they will support each other against it. Those whom we meet every day in familiar intercourse, are those whose favor and esteem we are most anxious to obtain. Besides, if the Judges be so numerous as to constitute a separate and influential body in the state, they, instead of being dependent on public opinion, often exercise a powerful influence over it. This is but a natural result of the popular prejudice in favor of rank, power, and the superior

talents which such a select body of men are supposed to possess. If that influence were universal the evil would not be so great, but those who are not contented to respect the decision of the Judges merely because it is theirs, but who, wishing to be satisfied of its justice, examine it themselves, will see an act of injustice under its real colours, and will experience a degree of alarm corresponding to the danger of that injustice being repeated.

If the plurality of Judges, far from offering any particular guarantee for honest decisions, tends to diminish the moral and legal responsibility of those officers, and consequently to remove an important security for their honesty, can it however be supposed to have any advantages with regard to the intellectual efficiency of the Court?

In reply to this question, it must be remarked that the great majority of cases are easy to decide, and require no great effort of attention on the part of the Judge. In such cases, any superiority of intellect which might be supposed to exist in several heads instead of one, is of course thrown away. But, besides, in a Court of ten, fifteen, or twenty Judges, it generally happens that one or two of them, are more active and laborious than the rest who trust almost every thing to them.

Again, the attention and application of several men are never so great, their energies are never so fully called into play, when they rely on each other, as those of one man left to depend solely on his own resources.

But it may be objected, that, in a difficult case, a body of Judges possess a mass of knowledge not likely to exist in one Judge; that one man may overlook some important point which could not escape the attention of all his brother Judges; that one has a better memory, another is more acute, a third has a more profound knowledge of the law, and all these qualities can be combined only in a Court composed of several members

In this objection it is forgotten, that a Judge who sits alone in a Court of Justice, is not altogether left to himself; each cause is pleaded before him by two advocates, who furnish him with the facts, the evidence and the law, and from whom much more zeal, and probably no less talent, is to be expected than from the union of several Judges. Besides, a decision is not necessarily final, the case may be carried to a Court of appeal and thus will be submitted to the investigation of two

Judges. Two men sitting in different Courts, are in general truly and really two Judges, because they are not under the influence of the same prejudices or the same habits, or do not rely on each other; whereas two men, sitting together in the same Court, although two Judges in appearance, can scarcely be more than one Judge in reality.

In addition to this, if a Judge be at a loss to come to a decision, nothing prevents him from availing himself of the assistance of other experienced lawyers not interested in the case. His responsibility will not let him neglect such precautions, when he believes them to be necessary.

After all, such suits are comparatively very few indeed, to which the usual talents and acquirements of a Judge are not equal. Ninety at least out of a hundred, are liable to neither doubt nor difficulty. The *power* of the Court, rather than the *science* of the jurist, is necessary to put an end to them. Out of the ten remaining, nine require but that common sense and information, which may be expected from a man who has given his attention to legal studies, and has acquired some experience in the administration of justice.

This proportion between easy and difficult cases may be contested, but what cannot be denied is the great economy of having only a single Judge instead of many, and the facility, thus obtained, of securing by a liberal salary the services of the best men procurable, instead of having common place men whom the small salary which the State could afford to each of them, would induce to accept the appointment of Judges. A Judge must not be left exposed to the temptation of poverty, his salary should be such as to secure him an honourable subsistence, and it will thus add to his moral and legal responsibility, the fear of losing in case of misconduct a valuable appointment. It is an error however to suppose that the amount of the salary, be it ever so great, can be a sufficient guarantee of a Judge's honesty; Publicity and Appeal, are the only certain preservatives of the purity of his conduct.

Judges should be, in general, gradually promoted from lower to higher appointments, partly according to seniority and partly according to merit. This rule gives dignity to the lowest judicial functions, by making them a necessary step to a more important charge. It tends also to produce emulation.

Should Judges be removable from their appointments at the discre-

tion of any authority in the state? Or should they be liable to be removed only on proof of incapacity or dishonesty?

In the former case it may be urged they would be too dependent on Government, and more disposed to endeavour pleasing those who have the power of ruining them, than to conform their decisions to strict justice; that, besides, the uncertainty of an appointment which might be lost without a legal judgment, would prevent some of the most honest and talented lawyers from accepting it, and would thus deprive the state of their services.

These objections are strong, but, on the other hand, it may be said, that if the appointment of a Judge can be cancelled only after a judicial investigation and a legal decision, a Judge will be maintained on the judgment seat, when it would be extremely desirable he should be removed. For instance, a Judge may have lost the public confidence, may have been guilty of neglect, or shown a lamentable want of temper, of judicial acuteness, or even of soundness of judgment, and still all this, which may be a matter of public notoriety, cannot perhaps be defined so as to be made the subject of a judicial investigation and proved in a Court of law.

On the whole it seems better that a Judge should be liable to be removed from his appointment, but the power of removing him should be subject to some check, and never exercised except for strong and obvious reasons. If that power be vested in a popular assembly, some precautions would be necessary to fix the number of votes required, and to determine the period within which the removal might not be ordered, so as to make sure that such an order would not be given under the impulse of the moment. It is easy to perceive, that there will generally be no need of great haste in a case, where the removal supposes only some imperfection without any legal offence.

To secure as much as possible the independence of the Judge, it should be a rule that when thus removed without a legal trial, he should indeed vacate the judgment seat, but that he should retain his allowances, and be re-eligible to a similar appointment. In such a case, a feeling of personal enmity would not be so likely to interfere in his removal, since it would not materially injure him; and on the other hand, private considerations, favourable to him, would not be so powerful in opposing his being removed, whenever this should appear desirable on public grounds.

Judges need not be considered as unfit to try cases in which any of their friends or relations are parties, provided it be established as a rule that they may recuse themselves when they see cause to do so, and that when they try a case in which they have some direct or indirect interest, they shall declare this publicly. From the moment a Judge does this, the public attention is fixed upon his conduct; and his honesty, instead of being exposed to a dangerous temptation, rests on as solid a foundation as it could well do.

The clause introduced into the oath of the English Judges, that they shall not listen out of Court to any thing relative to a case judicially before them, is not only proper but necessary. This secret opening to corruption must be closed. No one will say to a Judge: "Decide the case in my favour and I will give you so much;" but one who tries to tamper with a Judge, feels his ground, flatters him, tries to obtain his good wish, &c. From the moment, however, that any conference between the Judge and either of the parties is avoided, the Judge is saved, both from the danger of a temptation, and from that of being unconsciously and innocently influenced in his judgment by exparte representations.

CHAPTER III.

OF A PUBLIC PROSECUTOR.

When the law has been violated, the Judge can do nothing to punish the offence without an Informer, a Prosecutor and at least one Witness. These various functions may be united in the same person, but they are generally separated.

The offence, or some circumstance connected with it, may have had several witnesses, but the person who first gives information to the Judge is called an Informer.

If a man has witnessed some important fact, particularly one of those facts which the law holds up as an offence, he is naturally disposed to talk of it; but there is a great difference between this and giving a positive information to the Judge. A prejudice exists against assuming the part of an informer, besides this involves trouble and perhaps expense: supposing however these objections to have been overcome from public spirit, or some private motive, the informer who has thus come forward of his own accord to give his evidence, cannot be expected, as a matter of course, to be either willing or qualified to become the prosecutor, that is, to follow up the case, show its strong points, bring evidence to prove the fact contested, &c. &c. Thus in many cases, besides the informer, another person will be required who has leisure, intelligence and activity to do all that.

No one denies the necessity of a prosecutor; the difficulty is how to provide for this. There are four different modes. 1st. To admit any voluntary prosecutor who may offer himself. 2nd. To offer rewards for that service. 3rd. To appoint a Magistrate whose special duty will be to prosecute offenders. 4th. To unite those three methods.

Any of the three first methods of providing for the prosecution of offences, taken separately, is insufficient to answer the ends of justice. If the person disposed to give information be not a sufferer by the offence, he will not be disposed to incur all the trouble and expense

of a prosecution, and if he knew he should be compelled to prosecute, he would probably keep his information to himself. If he be a sufferer, he may in the first moment of irritation bring forward his complaints without thinking of the consequences, but why should a man who has suffered an injury, be condemned to suffer another, in seeking a reparation which, in the end, will probably be beneficial only to society? Besides, the informer may be a child, a woman, or a man altogether disqualified to carry on a prosecution. In addition to this, there is the danger of a compromise by which the ends of justice will be frustrated. The man who, under the influence of exasperated feelings, gave information to the Judge, may be induced by some private consideration to abandon the prosecution, or to continue it so that it shall fail of obtaining its object.

As for the offer of pecuniary rewards to induce individuals to come forward as prosecutors, notwithstanding the importance of such a means in some cases, it will often be insufficient.

First, people in that class of society which is in easy circumstances, and consists generally of educated men actuated by feelings of honour and delicacy, would be rather prevented than otherwise, from undertaking the part of an informer, by the public promise of a pecuniary reward. This practice may thus sometimes do more harm than good. To it is partly due the prejudice which exists against informers, as if such a part were always vile and disgraceful.

Secondly, very considerable rewards would in some cases be necessary, to overcome the natural motives which tend to prevent a prosecution being willingly undertaken. An information is given in a moment, it may be given in secret, but a prosecution is necessarily public, and may last for weeks, months or even years. How can men in general be expected to undertake, without a considerable reward, an anxious and laborious task, generally very unpopular, and which exposes them to private enmity? and, after all, what will the offer of a reward, under such circumstances, do, when the offender can secretly out-bid the public, and buy off his prosecutor who perhaps even is a friend of his in disguise, pretending to be anxious to prosecute him that he may garble the evidence and thus favour his escape?

The insufficiency of the two above modes being proved, the necessity of having a public prosecutor follows of course. As soon as such an officer is appointed the administration of justice is no longer sub-

ject to the caprice of individuals; the public is no longer exposed to the scandal of those offences which assume an insulting notoriety, and remain unpunished because no one comes forward to prosecute them. The law has then a representative above the fear of personal enmity, acting in its name, observing and collecting all that can assist him in tracing offenders, and armed with all the necessary authority to act with quickness and energy.

But in instituting the office of a public prosecutor, private prosecutions must not be excluded. This would tend to diminish the certainty of the punishment, and to give the officer in question an arbitrary power over the execution of the laws.

From the moment that voluntary prosecutors are admitted, they must be considered as working for the public good, and having a claim to an indemnity for the expenses they may incur. It is not just that when the party condemned cannot pay the costs, they should be left to be borne by the prosecutor.

CHAPTER IV.

COURTS OF APPEAL.

THE power of appealing from the decision of a lower to that of a higher Court, answers two important purposes: 1st. It opens a door to the annulment of an unjust sentence, whether that sentence was the result of ignorance and error, or of a corrupt motive; 2ndly. It tends to prevent unjust decisions being *intentionally* given, by taking away the hope of their being carried into effect, and to impress on the Judge the necessity of being as careful as possible in his investigations so that his orders may not be cancelled by the superior Court for error or irregularity.

A Court of appeal is not only useful, but it is absolutely necessary. Publicity and responsibility are very salutary and powerful checks, but they would be insufficient without a Court of appeal. Publicity no doubt tends to prevent an unjust decision, but it affords no remedy against such a decision when, from ignorance or dishonesty, actually passed. Legal responsibility cannot apply to mere errors of judgment. No one would consent to be a Judge on condition of being responsible for any such errors, which even in fact may be no errors at all, and are so considered, merely in consequence of a difference of opinion between the lower and the higher Judge.

The appeal to a superior Court necessarily causes delay and expense. These objections the legislator must endeavour as much as possible to remove.

One of the most important means to diminish the expense and delay of appeals is to establish as a principle, *that the Court of appeal cannot admit, as the basis of its decision, any other documents but those which were submitted to the lower Court against whose decision the appeal is made.*

An appeal supposes a wrong decision given by a lower Court through error or dishonesty. There may be neither error nor dishonesty in a wrong decision, if an important document, bearing on the case, was not duly brought forward. If this omission was accidental

there is no necessity for an appeal; an application to the same Court for a revision of judgment will answer the purpose.*

The strict application of the principle above laid down, has the advantage of enabling the legislator to establish the Court of appeal at the most proper place, without much regard to the distance at which that spot may be situated from the subordinate Courts. As nothing but records have to be transmitted, the distance is of comparatively little importance, and a great saving of time and money is thus effected.

There is one case in which the principle in question cannot apply. It is when the appeal is precisely grounded on the refusal of the lower Court to admit all the proofs brought forward. In such a case the Court of appeal can only, either take itself the evidence in question, or direct the lower Court to do so, or transfer that duty to some other Court in the neighbourhood of the latter.

The first of these remedies is liable to several objections: it would necessitate the establishment of several Courts of appeal in different parts of the country, so that each might not be at too great a distance from the lower Courts in its jurisdiction. Besides, by making the Courts of appeal in some cases Courts of original jurisdiction, the suits tried before them in their latter capacity, remain without appeal to a higher tribunal.

The rule of returning the case to the lower Court, with orders to take further evidence, is, on the contrary, free from objection whenever that Court is not suspected of any thing but an involuntary error.

When the honesty of the lower Court is impeached by the appellant, or its proceedings are suspicious, the case may easily be transferred for re-investigation to a neighbouring Court.

The best means to prevent vexatious appeals in civil cases, is immediately to execute the decree notwithstanding the appeal, provided the successful suitor gives security to return the object in dispute, or its value, if the superior Court decides against him. Besides, the appellant might, at the discretion of the Judge of appeal, be required, if cast, to pay up to the respondent all the expenses which the ap-

* A Judge cannot revise and alter his official decision, without the permission of the Superior Court, which permits this only on being satisfied that the ends of justice will be thereby better answered.

peal has caused the latter to incur, and even to compensate him for the trouble and loss of time to which he has thus been exposed.*

As every judgment is liable to error, every judgment should be liable to appeal. The importance of a suit for a given sum, depends on the means of the parties; what to the rich appears a trifling cause may be a very important one to a poor suitor. No limit should be laid down short of which a Judge may play the tyrant without any regular check.

There ought to be only one degree of appeal, and one Court placed in the metropolis where the influence of publicity would be greatest. If there were several Courts of appeal, one above the other, suits would become interminable and ruinous, and if those Courts were independent of each other, their occasional difference of opinion would introduce in the administration of justice, an element of uncertainty, which should if possible be avoided. Where nothing but records have to be transmitted, and this is done by post, an additional distance of one or two hundred miles is of comparatively little importance, and, when the Court of appeal consists of the ablest and most respectable Judges of the land, all possible precautions seem to have been taken to protect the community against erroneous or corrupt decisions.

The number of the Judges of the Court of appeal depends on the number of causes which they have to decide. This, experience only can show in each country.

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* Would it not be consistent with justice to exempt the *Respondent* from the costs of the suit, whether the appeal be decided for or against him, the amount of his expenses being, in the former case, repaid to him by the appellant, and in the latter by the state? By the decision obtained in the lower Court (when of course every transaction in that Court is free from suspicion) the party who becomes respondent in the appeal has been *officially* told that his right was good; he should not therefore suffer from prosecuting it.

CHAPTER V.

OF THE JURY.*

A JURY is an assembly generally consisting of twelve individuals, selected by a public officer or by lot, to investigate certain judicial cases, and to decide whether the fact, on which rests the question at issue, is proved or not.

The direct advantage of a jury is to secure, in a higher degree than permanent judges would do, good judicial decisions. This assertion is founded on the following considerations.

1st. A jury properly selected presents a high guarantee of impartiality. As the prosecutor and the supposed criminal have the right to challenge those in whom they have no confidence, it is probable that in general the members of the jury, are most of them unknown to the accused, and perhaps to each other and to the Judge. Jurymen, belonging to the middle classes, are not far removed from equality to those brought before them for trial, and can have no interest in the case but the maintenance of common rights, and the protection of innocence Each trial being for these temporary judges, an important and solemn act, which they are called to perform only at long intervals, they naturally give to it all the attention they can command, under the influence of the great responsibility resting upon them. It is not equally so with permanent judges, whom habit has reconciled to the chance of giving wrong decisions, and on whose minds consequently such a responsibility sits more lightly.

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* This chapter is a free translation from Dumont, who, in this instance, is opposed to Bentham. The latter in his last essays on judicial organization does away with the jury altogether. He only admits, as a kind of substitute for a jury, three assessors, properly selected, who would go through a judicial investigation with the Judge, without having any right to interfere with his decision. The whole advantage of such an institution is, the moral influence which the presence of the three assessors might have on the Judge.

2. A jury is comparatively independent of Government influence, which is not the case with Judges, who, although perhaps not liable to be removed from their appointments, may be influenced by the hope of promotion. Supposing even a jury to be biassed or tampered with, the evil would be limited to the particular case or cases submitted to their decision; the next jury would probably be free from the prejudices, or at all events would not be influenced by the corruption, of their predecessors.

3. A jury secures to every case a careful examination, and keeps constantly separate the question of fact and the point of law. Besides, the attention of a Judge to the details of the evidence, which he has to recapitulate before the jury, will be more constant, more profound than it would be if he had to decide the case himself.

4. A jury is more capable than a Judge to determine questions of fact, because, with regard to ordinary events, to the common feelings of men, and the motives which actuate them under particular circumstances, a private individual of common sense is better qualified to judge than a learned lawyer. The latter, who has spent a great part of his life in the study of his books, has had but little opportunity to become acquainted with the feelings entertained in active life; he cannot appreciate the prejudices and the local circumstances which may render an alleged fact more or less probable.

The institution of the jury has indirect advantages which alone would render it extremely desirable.

1. A feeling of self-respect and security is spread by this institution through the community. In some Governments an arbitrary power, exercised through the verdicts of complaisant Judges, threatens the high and the low. Admit the jury and all feel that they are subject only to the laws. Every man knows he can only be tried by his peers, that he will have a right to recuse all those whom he may suspect of a hostile disposition towards him, and that his fate will not depend on the caprice of any individual.

2. The institution of the jury, by rendering familiar to a large and influential class, their rights, the principles of justice, and the usual forms of procedure, enlarges their views and increases the influ-

ence of publicity on the mind of the Judge. He knows that any injustice he may commit cannot be concealed from his fellow citizens.*

The institution of the jury is not however free from objections.

1st. It takes away from their usual occupations, men who have no time, which they can afford to spare without injury to their interests.

2nd. No rules can secure the impartiality of the jury, with regard to cases in which their prejudices, religious or political, are concerned.

3rd. It places the Judge in a state of comparative irresponsibility, although the jury are however in general guided by him in their verdict.

The first objection renders it necessary to limit trials by jury to certain cases, such, for instance, as criminal cases of a serious description, particularly with regard to offences which it is difficult to define, as offences of the Press, &c.

The second objection may be obviated, when the prejudices alluded to are merely local, by transferring the trial from one place to another; and, when those prejudices are general, the objection does not apply solely to the jury, but would also more or less apply to Judges.†

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* It has been also stated in favor of the institution of the jury, that, where it exists, the Government cannot successfully attack public liberty by oppressive laws, as *the nation* possesses in itself the power of rendering them harmless. Thus in England, whose criminal code enacts the penalty of death against offences most different from each other in criminality, a jury has been known to absolve a prisoner obviously guilty of the act imputed to him, rather than subject him to a cruel punishment. Thus the oppressive and tyrannical laws against Roman Catholics were nullified in practice long before they were actually rescinded.

The power alluded to is however liable to very weighty objections, and tends to substitute popular prejudices for the provisions of the law. If this substitution be in some instances favourable to humanity, it may have an opposite effect in others, and at all events obviously tends, by the uncertainty it introduces in the administration of justice, to subvert the most important object of the law, Security.—*(Vide further the following note.)*

† This is only partly true; Judges are in general more enlightened than jurors, and, when acting by themselves, are placed under a feeling of moral responsibility from which the latter are sometimes comparatively free. In a country like Ireland, divided into two political or religious parties, too often animated towards each other by feelings of the most bitter hatred, trial by jury appears to be but ill calculated to answer the ends of justice. Instances have been quoted where a jury have acquitted a man of their own

It is undeniable that the institution of the jury does away with the *legal* responsibility of the Judge, but his *moral* responsibility is scarcely at all diminished. As the Judge cannot be held legally responsible except in cases of corruption, the loss of his *legal* responsibility, where a case of corruption can hardly occur, is not of much consequence. It is true that in summing up the case, the Judge may greatly influence the jury by the manner in which this is done; but his power in that respect is the result of his supposed impartiality, and as the jury have gone with him through the whole investigation, no men could be better qualified than they are to see whether the Judge's recapitulation of the evidence is impartial or not. In the latter case far from producing the expected result, it would produce a contrary disposition in the jury.

The security offered by a jury against the error or injustice of a Judge, supposes three conditions in the mode of constituting it.

1st. The jury should not be appointed by the Judge nor any one in his dependance.

2nd. It should be taken from the class of respectable individuals, partly according to a settled order and partly by chance, allowing the right of peremptory challenge.

3rd. The functions of the jury should be temporary.

One of the most difficult questions to decide, with regard to this institution, is, whether a mere majority should be required for its decisions, or whether unanimity is indispensable.

If unanimity be required as in England, and the jury be shut up together until they bring in their verdict, it may be doubted whether that unanimity is real or only apparent, whether it is the result of a conviction felt by all, or whether it was obtained from some members of the jury by fatigue and ennui. There cannot be any advantage in a merely nominal unanimity.

On the other hand it is urged, that, without the condition of unanimity, the jury would not give to the case a sufficient degree of attention; that the minority, having no hope of prevailing, would be discouraged at once, and would yield to the majority without discussion: that where there is a difference of opinion, the votes are much more

party against the clearest evidence. In some parts of the United States, the murderer of an "abolitionist" is said to be in very little danger of being convicted by a jury of his own countrymen.

likely to be reconciled to acquittal than to condemnation, a result which is desirable whenever there is any doubt in the minds of some of the jurors. As for the means sometimes used in England to obtain an unanimous verdict, they are the remains of a barbarous age, and a shocking contradiction in a legal system where torture, which is not permitted to be applied to the prisoner, is reserved for the jury.

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* If the rule of unanimity be maintained, it would apparently be proper to allow the jurors to separate as soon as they declare they cannot agree, and then to call together another jury to try the case.

When the jury are shut up until they declare their verdict, some of the jurors are compelled by ennui, fatigue, &c., to surrender their opinions, and the pretended unanimity exists only in appearance. It is either merely the verdict of the majority, or it may even be that of the minority who, more energetic than their opponents, tire them out until they yield to them.

THE END.

APPENDIX.

OFFENCES OF THE PRESS.

THE offences of the Press may be divided into four different classes.

I. *Disobedience to any law specially enacted for the regulation of the Press;* such, for instance, as omission of the printer to write his name and address on a work issuing from his establishment, in violation of a law requiring this as a guarantee against the printing of improper works.

II. *Offences against the Government, or against the peace of the state.* All the Acts of Government are fairly open to public discussion, but a person renders himself liable to the penalties of the law, who appeals to the passions of the people with the object of inducing an illegal resistance to, or any violation of, the laws of the land.

III. *Offences against religion and morality.* The liberty of the press implies the right of any one to print his opinions on any subject without first submitting them to the censorship of any person whatever, but gross insults to the religion of a portion of the citizens of the state, appeals to the passions against the practice of sacred moral duties, obscene works, indecent engravings, &c. are abuses of the liberty of the press which may be under some circumstances subjected to the repression of the law.

IV. *Defamation* or *Libel.** The criminal law of England considering a libel only as an act which tends to produce a breach of the peace, holds that the truth of the libel rather increases than diminishes the criminality of the offence. Other legislators have held that truth could be no libel. Between these two extreme opinions it seems that a proper medium might be found.

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* The word "Libel" legally means "*written* defamation," but there seems to be no good reason for not including *spoken* slander under the same rules.

1. The publishing of a real fact, which it is important to the public or to individuals to know, cannot consistently with the principle of General Utility be considered by the law as a libel, that is, as an offence liable to legal penalties, although the knowledge of the fact in question may be injurious to the reputation of the party whose conduct is thus exposed.*

2. On the other hand, the imputation, concerning any person, of an act calculated to injure the reputation of that person, is truly a libel when the publishing, or communicating, of the imputation can answer no good purpose. The degree of criminality of the offender in such a case, depends rather on his motives than on the truth or falsehood of his assertions. If those assertions were false, and known by him to be false, there can of course be no question as to their rendering him a fit object of punishment; if they were true, or believed to be true, either they were published for what was considered a justifiable purpose, in which case the publication could scarcely be a punishable offence; or that publication was the result of levity and indiscretion and in such a case it would assume some degree of criminality; or, lastly, it was done with a malicious intent, and if so it may, in some instances, be held almost equally criminal whether the imputation which forms the matter of the libel be true or not.

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* To express in good faith any opinion on the public conduct of an individual, or on his character so far as it appears from that conduct, is not a libel.

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